Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MARATHON OIL COMPANY,

Petitioner,

v.

BRUCE BABBITT, Secretary of the United States Department of the Interior, UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, *et al.*,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PATRICK G. PITET
Region Counsel
MARATHON OIL COMPANY
1501 Stampede Avenue
Cody, WY 82414-4721
(307) 527-3275

CRAIG R. CARVER
Counsel of Record
DON H. SHERWOOD
ALFERS & CARVER, LLC
730 17th Street
Suite 340
Denver, CO 80202
(303) 592-7674

Attorneys for Petitioner

153192

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

82pp

QUESTIONS PRESENTED

1. Whether petitioner Marathon Oil Company has standing to challenge a decision of the defendants removing certain lands nominated by Marathon from a scheduled oil and gas lease sale, and imposing a wilderness management regime on such lands?

2. Whether the Tenth Circuit Court of Appeals properly interpreted and applied this Court's three-part standing test when it affirmed the district court's holding that a decision in Marathon's favor could not redress Marathon's injury?

LIST OF PARTIES AND CORPORATE AFFILIATIONS

In addition to the petitioner and respondents listed in the caption, the Colorado Environmental Coalition and The Wilderness Society participated in the proceedings before the district court as defendants-intervenors and before the circuit court as appellees-intervenors.

The parent corporation of the petitioner is USX Corporation, and no publicly held company owns 10% or more of the stock of the petitioner.

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Marathon Oil Company ("Marathon") respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not officially rep(ted and is included in the appendix. (App. A at 1a). The opinion of the United States District Court for the District of Colorado is reported at *Marathon v. Babbitt*, 966 F. Supp. 1024 (D. Colo. 1997). (App. B at 6a).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was entered on January 6, 1999. Marathon filed a timely petition for rehearing and suggestion for rehearing en banc on February 5, 1999. On March 9, 1999, the Court of Appeals denied the petition for rehearing. (App. C at 11a). This Court has jurisdiction under 28 U.S.C. § 1254(1) (1993 & Supp. 1999).

STATUTORY PROVISIONS INVOLVED

This case raises the issue of the standing of Marathon to bring an action in the federal courts to review an adverse agency decision issued against Marathon. Marathon asserts that the decision is in violation of various provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1785 (1986 & Supp. 1999). (Pertinent portions of this statute are set out in App. D at 13a).

STATEMENT OF THE CASE

A. Course of proceedings and disposition in the courts below.

This petition arises out of an administrative protest filed by Marathon challenging certain actions (described in Section B below) taken by the United States Department of the Interior, Bureau of Land Management (BLM). On January 8, 1997, the BLM issued a final decision denying Marathon's protest. (App. E at 39a). Marathon then filed this action, seeking judicial review of that decision pursuant to 28 U.S.C. §§ 1331, 1361 (1993 & Supp. 1999).

Before the district court the government did not contest the appeal on ripeness grounds. It also conceded that Marathon had been directly injured as a consequence of the decision that Marathon challenged. Instead, it filed a motion to dismiss asserting that Marathon failed to meet the requirements of the "redressability" prong of this Court's three-part standing test. The district court granted the motion and dismissed the action by decision dated June 16, 1997 and reported at *Marathon v. Babbitt*, 966 F. Supp. 1024 (D. Colo. 1997). (App. B at 6a). The Tenth Circuit Court of Appeals affirmed in a non-published decision (App. A at 1a). This petition followed.

B. Factual Background.[1]

In 1976 Congress enacted the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701-1784 (1986

1. The factual assertions set forth in this brief are drawn from Marathon's Complaint, the administrative record filed by the federal defendants with the district court (referred to by bates numbers applied to that record, *e.g.* "BLM0663" or by appendix number as used in the Tenth Circuit proceedings, *e.g.* "Aplt. App. at 113"), and relevant (Cont'd)

& Supp. 1999). Thereafter, the Department of Interior issued a variety of implementing rules and regulations, including those dealing with resource management planning procedures,[2] withdrawal procedures[3] and wilderness inventory and interim management procedures.[4]

In 1980 the Colorado State Office of the BLM completed the wilderness inventory called for by § 603 of FLPMA, 43 U.S.C. § 1782 (1986 & Supp. 1999). The outcome of this inventory was a BLM determination that the lands that ultimately became the subject matter of this lawsuit (located in the Vermillion Basin area of northwest Colorado) were found not to possess wilderness characteristics. Accordingly, BLM did not designate the lands at issue as wilderness study areas nor did it recommend them for ultimate inclusion in the national wilderness system.

After the results of the BLM wilderness inventory were announced, public comments were accepted, hearings were held, final decisions on the various inventory units were announced, and, in some cases, protests were filed and appeals

(Cont'd)
statutes and regulations. Because the district court's decision was issued in response to a motion to dismiss, all well-pleaded factual allegations contained in the Complaint must, at this stage of the proceedings, be presumed to be true. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Similarly, the Court must presume that Marathon's general allegations embrace those specific facts that are necessary to support its claims. *Bennett v. Spear*, 520 U.S. 154, 168 (1997).

2. 43 C.F.R. Part 1600 (1998).

3. 43 C.F.R. Part 2300 (1998).

4. Interim Management Policy and Guidelines for Lands Under Wilderness Review, 48 Fed. Reg. 31,854 (1983) and 44 Fed. Reg. 72,027 (1979).

were pursued concerning the merits of the BLM's decisions. No appeal was filed challenging the BLM's final determination that the lands at issue in this case lacked wilderness characteristics. As these decisions became final, inventoried lands that were determined not to possess wilderness characteristics were freed from interim wilderness management restrictions.[5] These lands were then incorporated into the broader, multiple use, land planning process called for by § 202 of FLPMA, 43 U.S.C. § 1712 (1986 & Supp. 1999).

In 1983 the BLM began preparation of a resource management plan (RMP) and environmental impact statement (EIS) to guide and control future management actions on the public lands in the northwest corner of Colorado. After conducting numerous scientific studies and public hearings, analyzing a wealth of information, preparing drafts, conducting additional hearings and receiving numerous comments from the public and various federal and state agencies, in 1989 the BLM approved an RMP, finalized a Record of Decision (ROD), and issued a Final EIS.

In 1991, at the conclusion of another extensive process of study, public hearings, drafts, comments and further hearings, the BLM formally amended the RMP to incorporate the results of a statewide study of oil and gas leasing and development.

The approved ROD of the amended RMP concluded that "1,878,000 acres of BLM-administered mineral estate within

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5. *See Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 750 (10th Cir. 1982) ("Under Interior's policy, the wilderness review period will result in only a brief hiatus from potential mineral development for most of the lands concerned. Lands containing oil and gas, and of no wilderness value, will be released from the review unharmed and fully suitable for mineral development.")

the Little Snake Resource Area are open to oil and gas leasing and development. . . ." (Aplt. App. at 113).

After 1991, Marathon utilized the results contained in this and many other BLM RMPs to select areas as candidates for geologic study and exploration. The area of northwest Colorado covered by the Little Snake Resources Area RMP had produced oil and gas from shallower formations for decades. The development of new exploration technologies, such as 3-D seismic, made these lands (particularly the deeper horizons) prospective. The federal government owned most of the minerals in the area. Most of the lands had been leased at one time or another in the past. Virtually all of the surface acreage in the area had been thoroughly studied for wilderness, critical habitat, or other restrictive management regimes, and had been released from any restrictions which would adversely affect an oil and gas exploration program.

As a consequence of the results of both its own geologic studies and the approved RMP, in 1996 Marathon determined to conduct a more intensive exploratory program in the area. It acquired leases in the area, and entered into farm-in and other contractual arrangements with existing lessees in the area whereby, in exchange for conducting seismic studies and drilling wells, Marathon could earn interests in the leases. Marathon then conducted a 3-D seismic program and used the results from that program to develop locations for further exploration. Marathon expended over $3.5 million in these exploration activities in the Little Snake Resources Area.

On August 20 and September 5, 1996, Marathon wrote to the BLM to nominate various lands for inclusion within the next scheduled BLM competitive oil and gas lease sale. Pursuant to BLM regulation, 43 C.F.R. § 3120.1-1(e) (1998),

the sending of such expressions of interest is the mechanism that is utilized to trigger BLM review of the nominated tracts.

The BLM reviewed the nominated tracts and concluded that under its governing laws, regulations and approved RMP they were available for leasing. On September 25, 1996, the BLM published a notice stating that the nominated tracts would be made available for leasing at a competitive sale to be held on November 14, 1996. BLM's decision in this regard was based upon, and consistent with, the existing approved RMP.

Throughout this process Marathon had been relying upon the approved, published, RMP of the BLM. There existed at this time, however, an unpublished policy that was unknown to Marathon as it made its exploration decisions. This unpublished policy contradicted and negated the results of the approved RMPs. It originated out of a memorandum issued by Secretary Babbitt on November 1, 1993. The Secretary's policy was implemented first in Utah.[6] The Secretarial policy was then applied in Colorado by means of an oral agreement between the Colorado State Director of the BLM and representatives of the Colorado Environmental Coalition (CEC) made in the summer of 1994.

This oral agreement specified that if the CEC believed that BLM lands ought to be preserved as wilderness, then BLM would manage those lands as if they were BLM designated wilderness study areas. In particular, the BLM agreed that such lands would not be offered for oil and gas lease sales.

This agreement was so procedurally and substantively irregular that it was not published, nor even publicly

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6. *See State of Utah v. Babbitt*, 137 F.3d 1193 at 1210-11 (10th Cir. 1998) for a description of how the Secretary's policy has been applied in that State.

acknowledged, until several years after it was entered into. One internal Colorado e-mail message in the administrative record described the "policy shift" that emerged from a meeting in Washington in these terms:

> we had previously said ". . . will use decisions in the land use plans", [the State Director] was apparently asked to not allow leasing or other uses in the CEC proposed areas until a "national policy" is prepared (to be released after the election). (BLM0720).

When the Colorado State Director asked his staff to draft proposed public notices to acknowledge this policy shift, he received the following suggestions in response:

> As of March 24, 1995, the Bureau of Land Management has (illegally) adopted a policy of not offering lands for competitive oil and gas lease sale through expressions of interest within areas proposed by the Colorado Environmental Coalition (CEC) for wilderness study. (BLM0866).
>
> This policy constitutes a de facto withdrawal. The legal requirements to withdraw lands from the operation of the mineral leasing laws are not being met. (BLM0867).
>
> Paul's "illegal" addition [a reference to BLM0866, quoted above] would suit me fine, although I am obviously overruled in this thing by the state director's position. (BLM0663).

Needless to say, none of these proposed "notices" were published. Instead, the policy shift remained unknown to

Marathon until its nominated tracts were removed from the November 14, 1996, sale.

Some of the tracts nominated for leasing by Marathon were located within areas designated by the CEC as proposed wilderness areas. These same tracts had been publicly approved during the RMP process as suitable for oil and gas leasing. When representatives of the CEC reviewed the public posting of lands that were to be offered for oil and gas leasing, they discovered the overlap, called it to the attention of the BLM, and demanded that the BLM honor its oral agreement. In response, on November 6 and 13, 1996, the BLM issued two "Addenda" to its sales notice, withdrawing several of the Marathon-nominated tracts from the November 14 sale.

The effect of this process on Marathon was graphically described in an internal BLM memo:

> The situation boils down to the concessions granted by this office to a special interest group. These concessions are in turn impacting other BLM customers. The special interest group (CEC) has succeeded in convincing us to effectively withdraw lands from multiple use outside of the normal planning process and without public participation . . . Marathon has spent time and money attempting to assemble an oil and gas play in Northwest Colorado and Southwest Wyoming. They even received approval for a Development contract (2.4 million acres in Wyoming and Colorado) covering the area complete with an exploration commitment to BLM. When time came to consolidate their land position, BLM Colorado pulled parcels from the lease sale because they were contained in CEC's proposed conservation areas (A WSA by any other

> name.). . . . How sorry we are to have misled anyone by approving a development contract, requiring exploration expenses, and then hindering the performance of that contract. (BLM0696).

As described in Section A above, Marathon formally protested BLM's decision to withdraw the nominated tracts from leasing, the BLM denied the protest (App. E at 39a), Marathon sought judicial review of that decision, and the lower courts dismissed Marathon's suit for lack of standing. This petition followed.

REASONS FOR GRANTING THE WRIT

I.

THE TENTH CIRCUIT HAS SELECTIVELY DETERMINED WHEN TO APPLY THIS COURT'S *LUJAN II* AND *BENNETT* DECISIONS, AND WHEN TO IGNORE THEM.

In the proceedings before the Tenth Circuit Marathon relied upon this Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997). The Court of Appeals held, however, that "*Bennett* is not germane." (App. A at 4a).

The circuit court's decision bases this conclusion on two factors. First, it concludes that since both *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (*Lujan II* [7]), and *Bennett* were Endangered Species Act (ESA) cases, they are "inapposite." This statement implies that the Tenth Circuit regards the holding and rationale of both these cases as being confined

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7. This Court's standing decision issued in *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990), will be referred to in this petition as *Lujan I*.

solely to cases arising under that statute. Second, the circuit court based its conclusion on what it asserted to be "the absence of economic harm in this case," as opposed to the presence of economic harm in *Bennett*. (App. A at 4a).

In reaching its first conclusion, the circuit court disregarded the fact that the *Bennett* decision expressly considered plaintiffs' standing under both the ESA's citizen's suit provision and the Administrative Procedure Act (APA).[8] By ignoring that factor, the Court of Appeals evaded and failed to apply to this APA appeal the important standing guidelines articulated in this Court's *Lujan II* and *Bennett* decisions.

One of those important guidelines quantifies the weight of the standing burden shouldered by a plaintiff at the motion to dismiss stage of a case. Here the allegations contained in Marathon's pleadings explicitly delineated its harm, to the point that the government acknowledged before the district court that:

> DOI does not argue that Marathon Oil Company ("Marathon") has not suffered any harm as a result of the deletion of certain parcels from the November, 1996 BLM competitive oil and gas auction.

(Aplt. App. at 372-3).

In *Bennett* this Court held that the Ninth Circuit had improperly denied standing to plaintiffs who had met their "relatively modest" burden (at the motion to dismiss stage) of alleging that their injury is "fairly traceable" to the administrative action complained about and that it will "likely"

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8. 5 U.S.C. §§ 551-59, 701-06 (1996 & Supp. 1998).

be redressed — i.e., the agency will not impose the subject restrictions — if the action is set aside.[9]

Unfortunately, issuance of the *Bennett* decision has not eliminated the erratic treatments which lower courts have given to this Court's standing tests. Nowhere was this confusion initially more apparent than in cases where plaintiffs brought judicial challenges of Forest Service and BLM management plans. The result was a split in the circuits,[10] which this Court sought to resolve by ruling that such challenges were normally nonjusticiable because they were not yet ripe for review. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 118 S. Ct. 1665 (1998).

Significantly, although the Sixth Circuit decision in *Ohio Forestry* had concluded that the Sierra Club had standing to bring the suit and that the challenge was ripe for review, this Court reversed solely on the ripeness issue. In so doing, it based its decision upon the conclusion that "The Sierra Club thus will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain." *Id.* at 1670. Furthermore, this Court noted with approval government concessions made in briefs and oral argument that if properly presented in a complaint raising such issues, "a final decision to close a specific area to off-road vehicles" that resulted in "imminent concrete injury to a party with an interest in the use of off-road vehicles in that area" "would be immediately justiciable." *Id.* at 1673.

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9. *Bennett* at 116.

10. For example, the Eighth Circuit held that plaintiffs lack standing to bring such suits. *Sierra Club v. Robertson*, 28 F.3d 753 (8th Cir. 1994). The Ninth Circuit found standing in *Resources Ltd. v. Robertson*, 35 F.3d 1300 (9th Cir. 1994), *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705 (9th Cir. 1993), and *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699 (9th Cir. 1993).

Marathon's petition in this case presents a fact situation virtually identical to that described in *Ohio Forestry*. Here Marathon has challenged in its complaint a final BLM decision to close a specific area to oil and gas leasing. The challenged decision resulted in documented concrete injury to Marathon. Marathon is a plaintiff with a specific interest in the issuance of mineral leases in the particular area covered by the challenged BLM decision. Yet, contrary to the guidance provided in *Ohio Forestry*, the Tenth Circuit ruled that the controversy is not "immediately justiciable." Instead, by ruling that Marathon lacks standing to bring its appeal, the Tenth Circuit went so far as to conclude that the issues raised by Marathon are *never* justiciable.

In so concluding, the Tenth Circuit decision has affirmatively disregarded this Court's *Bennett* and *Ohio Forestry* decisions. Another Tenth Circuit decision, *State of Utah v. Babbitt*, 137 F.3d 1193 at 1204 (10th Cir. 1998), establishes that when that circuit chooses to apply *Bennett*, it knows the result that must be reached. In *Utah* plaintiffs' sixth cause of action asserted that defendants are imposing a "de facto wilderness management standard," in violation of FLPMA, the result of which is to preclude many uses on the affected federal lands. This particular cause of action arose out of the same Secretarial policy directives, and had the identical impact, as the Colorado action challenged by Marathon in this case. The court applied the principles articulated in *Lujan II* and *Bennett* and held:

> because general allegations of injury based on a legally cognizable right suffice at this stage, and because we must accept as true Plaintiffs' factual allegations, we conclude that Plaintiffs do have standing to bring their de facto management claim.

137 F.3d at 1215.

In this case, by contrast, the Tenth Circuit rejected Marathon's allegations of injury and the government's concession that Marathon suffered injury, and concluded: "[b]ecause of the absence of economic harm in this case, however, we believe *Bennett* is not germane." (App. A at 4a). Based upon this inexplicable finding of no economic harm, the court then proceeded to hold that since:

> [t]he jurisprudence of standing "is a highly case-specific endeavor, turning on the precise allegations of the parties seeking relief" . . . . [w]e are satisfied, however, this case falls in step with its Tenth Circuit precursors. See also *State of Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998).

(App. A at 4a).

Inasmuch as the *Utah* case involved an identical challenge to the same Secretarial policy, yet reached the opposite standing conclusion, it is impossible to ascertain from the circuit court's opinion why its decision in this case "falls in step with" the Tenth Circuit's decision in *Utah*. Rather than there being any consistency between the two decisions, what they illustrate is that the Tenth Circuit regards the decision of whether to apply *Lujan II* and *Bennett* as optional. When it chooses to acknowledge that they are germane and apposite, it finds that the plaintiff has standing; when it chooses not to apply those cases, it reaches the opposite result. It arrogates to itself the unconstrained power to make this decision by articulating a "highly case-specific" standard that is deliberately left so vague as to preclude rational analysis or predictive application.

The Tenth Circuit's "case-specific" application of standing principles in this case has turned those principles on their head. Standing principles are supposed to ensure that an individual

who is the very *object* of a law's requirement "always has standing" to challenge a prohibition imposed against him, while they erect suitable barriers against efforts of those representing broader interests to enmesh the courts in issues that ought to be more appropriately addressed in the political and administrative arenas.[11]

It was the inversion of these principles that was addressed by this Court in *Bennett*. The decision of the Tenth Circuit to selectively determine when *Bennett* is "germane," and when it is not, has allowed the Tenth Circuit to conclude that broadly based organizations (such as the State of Utah) have standing to challenge the Secretary's imposition of a *de facto* wilderness management regime, but individual entities (such as Marathon) which suffer direct injuries from such management decisions, do not.

The implications of the Tenth Circuit's decision in this case are profound. That decision indicates that this Court's standing decisions continue to be applied in wildly erratic fashions, even within the same circuit. The case illustrates an unfortunate tendency to utilize this Court's standing decisions on a selective basis, in order to avoid the merits of cases brought by politically unpopular litigants (such as oil and gas companies) in the context of popular causes (such as wilderness

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11. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881-82 (1983) ("[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*. Thus, when an individual who is the very *object* of a law's requirement or prohibition seeks to challenge it, he always has standing. . . .")

protection).[12] The holding of the Tenth Circuit, by insulating the Interior Department from judicial review, frees that agency from restrictions imposed by law. It thereby allows the Secretary of the Interior to claim and exercise a degree of discretion in leasing matters that (as he contends in his briefs) is "absolute." All of these unfortunate consequences occur because the decision of the Tenth Circuit violates this Court's guidance and precedents.

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12. As academic commentators have noted:

> To date, however, the two [*Lujan*] cases have not significantly affected the ability of public interest environmental litigants to convince the courts to reach the merits in public lands cases. . . . Indeed, the litigants most frequently thrown out of court on standing grounds subsequent to the *Lujan* cases have been those seeking to challenge restrictions on development.

George C. Coggins and Robert L. Glicksman, "*Evolution of Federal Public Land and Resources Law*," Rocky Mtn. Min. L. Special Inst., Public Land Law II (Nov. 1997); this has been a recurring problem associated with standing cases. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 3-18, at 130 (2d ed. 1988) ("In the guise of causality analysis, federal courts will engage in an unprincipled effort to screen from their dockets claims which they substantively disfavor. Indeed, the causation requirement has come under increasing attack from commentators for being what Justice Brennan has termed 'no more than a poor disguise for the Court's view of the merits of the underlying claims.' ")

II.

BY SELECTIVELY APPLYING THIS COURT'S STANDING DECISIONS, THE TENTH CIRCUIT IS EVADING ITS RESPONSIBILITY TO REVIEW CHARGES OF ADMINISTRATIVE IMPROPRIETY AND ILLEGALITY.

The allegations asserted by Marathon against the Secretary of the Interior and the BLM in its Complaint are quite serious. They are also documented in detail in the administrative record of the case, large portions of which were obtained as a consequence of BLM's providing internal e-mail correspondence in response to Marathon's Freedom of Information Act request. A very brief sampling of this record is quoted in Marathon's Statement of Facts set out above.

In essence, Marathon's allegations (which must, at this stage of the proceedings, be presumed to be true) and this administrative record outline a two-track decision-making process. One track consisted of an elaborate, multi-year process, costing literally millions of public dollars, involving numerous inventories, studies, EISs, and substantial public input. That process was mandated by a variety of applicable laws, most notably FLPMA and NEPA,[13] and was carried out with scrupulous care by the BLM. The outcome of this public, statutorily-mandated process was a formal BLM decision that the lands at issue in this case were suitable for oil and gas leasing and were to be offered at a public, competitive, lease sale to be held on November 14, 1996.

The second decision-making track consisted of private meetings between representatives of a single special-interest

13. National Environmental Policy Act of 1969, 42 U.S.C. § 4332 *et seq.* (1994 & Supp. 1999).

organization (the CEC) on the one hand, and the Secretary of the Interior and the then State Director of the Colorado office of the BLM, on the other.

This unpublished decision-making process blindsided Marathon after Marathon had based a number of its exploratory decisions and the expenditure of over $3.5 million on the results of the BLM's publicized decisions. Tracts that had been identified for leasing as a consequence of Marathon's expenditures were pulled off the sales list, and made indefinitely unavailable for leasing by virtue of the application of an unpublished decision.

Today, over five years after the policy was secretly adopted, it remains in full force and effect. The sole criterion for imposition of this *de facto* wilderness management regime was — and remains — whether a private organization has designated an area as part of its proposed wilderness areas. Where — as in this case — the CEC designation conflicts with a prior BLM designation, BLM allows the CEC designation to trump the outcome of its own public RMP process.

The Tenth Circuit decision means that even if Marathon proves all of this true, Marathon nevertheless lacks standing to challenge the decision. In his evaluation of *Lujan II* published shortly after it was issued, Professor Cass Sunstein addressed the question of whether the opinion of the Court in that case ought to be read as radically altering traditional understandings of standing in administrative cases. He concluded that it should not:

> A contrary conclusion would produce surprising results. It would mean that Article III imposed a constitutional obstacle to most ordinary

> administrative law cases. In the usual case, a litigant contends that an agency has failed to follow some procedural requirement — by holding inadequate hearings, failing to give notice, meeting with private people, or attending to a statutorily irrelevant factor. In all such cases, it might well be said, under the apparent standard in *Lujan*, that the redressability requirement has not been met. In such cases, it is entirely "speculative" whether a decree in the defendant's favor will remedy the alleged injury. *Lujan* cannot be understood to say that these conventional cases have all of a sudden become nonjusticiable.[14]

This Court's *Bennett* and *Ohio Forestry* decisions established that in this regard Professor Sunstein's analysis of *Lujan II* was correct: conventional administrative law cases have not all of a sudden become nonjusticiable. However, the Tenth Circuit's decision that *Bennett* is not germane to this appeal has produced exactly the "surprising result" that Professor Sunstein warned against. The Tenth Circuit has taken a conventional administrative law case and made it nonjusticiable.

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14. Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 208-9 (1992).

III.

DEPRIVING MARATHON OF STANDING TO CHALLENGE THE SECRETARY'S LEASING DECISIONS FREES THE SECRETARY FROM LEGISLATIVE CURBS ON THE EXERCISE OF HIS DISCRETION.

By denying Marathon standing, the lower courts' decisions necessarily pose the question: under what circumstances are the Department's leasing decisions subject to judicial review? The government has sought to answer this question in its briefs below. Those briefs defend the courts' decisions on the ground that a Secretary of the Interior possesses "absolute authority . . . to refuse to lease federal lands," (Answer Br. at 41) consequently no one possesses standing to challenge leasing decisions, and no court is empowered to review them.

In oral argument, one member of the Tenth Circuit panel asked counsel for the government whether this conclusion would hold true even if it turned out that the decision in question were obtained as a result of outright corruption or political influence. The government's response was that in such a case, while the Attorney General could prosecute the decision-maker, nevertheless, no private party would have standing to challenge the legality of the decision.

The Secretary has thus confirmed that, in his view, the effect of the circuit court's decision is to replace the Constitution's delegation to Congress of the "power to dispose of and make all needful Rules and Regulations respecting the . . . property belonging to the United States," U.S. Const. art. IV, § 3, cl. 2, with the executive branch's assertion of an "absolute authority" vested in the Secretary. The Secretary is claiming that — notwithstanding the APA — no one has

standing to challenge the manner in which he exercises the discretion granted to him.

The district court accepted this conclusion when it held:

> only an order of this court compelling the executive branch to make land available for competitive leasing . . . would likely redress Marathon's claimed injuries. This I do not have the power to do.

966 F. Supp. at 1026. (App. B at 9a). This reasoning holds that since the Secretary has the ultimate power to decide whether or not to lease lands, and since that power is a discretionary one, there is nothing that a court can do to redress Marathon's injury.

This Court has recently explained the fallacy of the district and circuit court's logic on this point in *Federal Election Comm'n v. Akins*, 524 U.S. 11, 23 (1998):

> Agencies often have discretion about whether or not to take a particular action. Yet those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground. If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case — even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason. Thus respondents' "injury in fact" is "fairly traceable" to the FEC's decision not to issue its complaint, even though the FEC might reach the same result

> exercising its discretionary powers lawfully. For similar reasons, the courts in this case can "redress" respondents' "injury in fact."

Until the decisions of the lower courts in this case, Secretarial and BLM decisions regarding the leasing of public lands were required to conform to the procedures and substance dictated by Congress in enacted legislation such as FLPMA.

The constraints imposed by FLPMA on how the Secretary is supposed to formulate and implement his leasing decisions are detailed and numerous. For example, § 202(a) of FLPMA, 43 U.S.C. § 1712(a) (1986), requires the Secretary, "with public involvement and consistent with the terms and conditions of this Act," to "develop, maintain, and when appropriate, revise land use plans which provide by tracts and areas for the use of the public lands."

Secretarial decisions issued to implement land use plans developed in accordance with FLPMA's requirements must conform with particularized guidelines, such as those contained in 43 U.S.C. § 1712(e)(2) (1986):

> Any management decision or action pursuant to a management decision that excludes (that is, totally eliminates) one or more of the principal or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more shall be reported by the Secretary to the House of Representatives and the Senate.

The term "principal or major uses" is defined in 43 U.S.C. § 1702(l) (1986) to include "mineral exploration and production." The BLM's action challenged in this appeal eliminates mineral exploration and production for more than

one hundred thousand acres and it has already lasted well over two years, yet it has never been reported to the Congress.

Section 603 of FLPMA, 43 U.S.C. § 1782 (1986 & Supp. 1999), contains Congress' specific directions to the Secretary concerning the manner in which lands administered by the BLM were to be reviewed for wilderness study. That section constitutes the exclusive source of authority for the Secretary to impose restrictive land management policies upon lands for wilderness study purposes. It allocated 15 years from October 26, 1976, in which the Secretary was required to complete the process of identifying lands having wilderness characteristics. As to those tracts of land so identified — and only those tracts — the Secretary was directed to report to the President his recommendation as to their suitability or nonsuitability for permanent preservation under the provisions of the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1985 & Supp. 1999). The BLM's decision in this case extends this process indefinitely, thereby violating FLPMA's 15-year deadline.

Section 204 of FLPMA, 43 U.S.C. § 1714 (1986 & Supp. 1999), authorized the Secretary "to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section." Subsections (b) and (c) of § 204, 43 U.S.C. §§ 1714(b)-(c) (1986), require that whenever the Secretary shall propose a withdrawal on his own motion, he must publish a notice in the Federal Register and, if the withdrawal aggregates 5,000 acres or more, notify both Houses of Congress of such withdrawal and furnish a report containing a detailed analysis as specified in subsection (c)(2) of § 204, 43 U.S.C. § 1714(c)(2) (1986). Subsection (h) requires that before the Secretary can make any new withdrawals, he must provide an opportunity for a public hearing. 43 U.S.C. § 1714(h) (1986). The BLM's decision here

withdraws lands from mineral leasing without following any of these procedures.

Section 302 of FLPMA, 43 U.S.C. § 1732 (1986 & Supp. 1999), requires: "The Secretary *shall* manage the public lands under principles of multiple use and sustained yield, *in accordance with the land use plans* developed by him under section 1712 of this title. . . ." (emphasis added) In order to implement this mandatory provision, 43 C.F.R. § 1610.5-3 (1998) mandates that, "[a]ll future resource management authorizations and actions . . . *shall* conform to the approved plan" (emphasis added). 43 C.F.R. §§ 1610.2, 1610.5-5 and 1610.5-6 (1998) further dictate that the approved plan may not be amended or revised without formal public involvement, inter-agency coordination and submission to the NEPA process. Accordingly, the Secretary's actions are required by law to conform to the approved RMP until such time as the RMP is amended or revised and approved in accordance with the applicable regulations.

The BLM carefully complied with all aspects of these detailed requirements in reaching its decision to post Marathon's nominated lands for lease sale. The Secretary discarded and rejected all these requirements when he imposed the decision that is challenged in this case. If Marathon has no standing to bring a judicial challenge of that decision, then who does? If no one has standing to challenge the Secretary's disregard for legislatively imposed constraints on his leasing decisions, then he will have no more need to adhere to legislated constraints in the future than he has had in this case.

IV.

THE TENTH CIRCUIT DECISION APPLIED TOO STRINGENT A REDRESSABILITY TEST.

In applying this Court's "redressability" prong of the standing test, the Tenth Circuit applied a more stringent standard than ought to be applied under the facts posed by this case.

The district court in this case premised its decision on what amounts to a finding of fact that "*only* an order of this court *compelling* the executive branch to make land available for competitive leasing . . . would likely redress Marathon's claimed injuries." (App. B at 9a (emphasis added)). This finding of fact is unsupported by any facts pled in Marathon's complaint or contained in the administrative record. Instead, it is directly contradicted by those allegations and facts.

Marathon alleged that the lands it seeks to lease were subjected to a lawful and appropriate review by BLM, and found to be suitable for leasing. Marathon next alleged that the Secretary's policy intervened, resulting in withdrawal of those tracts from the sale list. Marathon challenged the Secretary's policy as being arbitrary, capricious and contrary to law. Finally, Marathon alleged that a judicial declaration of the invalidity of the Secretary's policy, combined with a prohibition against its imposition, would result in the lands Marathon seeks being once more made available for lease, thus redressing its injury. Marathon acknowledges that it cannot prove with absolute certainty that the Secretary will act lawfully once the courts declare what the law is in this situation, but Marathon believes that it has carried its burden of establishing that it is *likely* that a judicial prohibition against application of the Secretary's illegal policy will result in return to the lawful

practices actually followed by BLM prior to application of the challenged policy.

Marathon raised this as its first point on appeal before the Court of Appeals. The circuit court decision understood this, and correctly summarized Marathon's contention. (App. A at 3a). Having identified this key issue, the panel decision then mentioned it no more.

The only consideration given by the circuit court to the facts pled in Marathon's complaint or contained in the administrative record is to erroneously state that they frame a case where there is "an absence of economic harm." (App. A at 4a). In substituting their own views of the facts for those actually alleged by Marathon and actually contained in the administrative record, the district and circuit court decisions both violate *Bennett's* requirements and apply a redressability test that is much more stringent than the "relatively modest" one that is supposed to apply at this stage.

The district and circuit court decisions also fail to acknowledge the importance of the fact that Marathon has been directly injured by the administrative decision it challenges. Professor Sunstein has noted that in *Lujan II*:

> the Court added that the standing issue will often be affected by "whether the plaintiff is himself an object of the action (or forgone action) at issue." If the plaintiff is an object, the three requirements will ordinarily be met. But when an "injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed." . . . The Court suggested that in such cases standing "is ordinarily 'substantially more difficult' to establish." The Court had implicitly drawn this

> distinction in *Allen v. Wright*, [468 U.S. 737 (1984)], but *Lujan* was the first case explicitly to mark out the categories.

Sunstein, *supra*, at 199.

The *Lujan II* decision pointed out in its famous footnote 7 that this distinction is particularly important when a plaintiff asserts violation of its procedural rights:

> The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered. . . .

504 U.S. at 572 n.7.

In sharp contrast to the method followed by the district and circuit courts in this case, this Court in *Bennett* followed these guidelines by examining closely the allegations contained in the complaint. It also examined in detail the practical effect which the challenged administrative action had on the concrete interests of the plaintiffs. As a consequence, as one lower court has properly held, where the plaintiff has been injured in a concrete and immediate fashion, the "relatively modest" burden imposed by the redressability test is met when the facts outlined in the complaint demonstrate "that 'but for' defendants' intervention, plaintiff . . . already would have been allowed" to undertake the activity which defendants' intervention

precluded. *Bonnichsen v. United States*, 969 F. Supp. 628, 635 (D. Or. 1997).

Neither the district nor the circuit court in this case provided any explanation of why it concluded that Marathon failed to show a substantial likelihood that its injury will be redressed by a favorable decision. Each further erred when it rejected the proposition that this Court has adopted differing standards for its redressability test, dependent upon whether the agency action at issue directly, imminently and concretely injures the particularized interests of the plaintiff.[15]

This conclusion directly conflicts with *Lujan II*.[16] This point was re-emphasized by the holding in *Bennett*, where the

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15. The district court's ruling on this point stated: "It was not the Supreme Court's holding, however, that there is a difference between a third party complaining of a government action directed at someone else and a first party directly affected where all the necessary parties are before the court." (App. B at 8a).

16. This Court made its point twice. In part II the majority stated:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation of *someone else*, much more is needed.

504 U.S. at 561-62.

(Cont'd)

plaintiffs suffered direct injury to their own economic interests. 520 U.S. 154 at 167.

The distinction between a plaintiff whose injury is direct, concrete and particularized and one whose injury is shared by the population at large lies at the core of the doctrine of standing:

> I suggest that courts need to accord greater weight than they have in recent times to the traditional requirement that the plaintiff's alleged injury be a particularized one, which sets him apart from the citizenry at large. . . .
>
> Unless the plaintiff can show some respect in which he is harmed *more* than the rest of us . . . he has not established any basis for concern that the majority is suppressing or ignoring the rights of a minority that wants protection, and thus has not established the prerequisite for judicial intervention.[17]

(Cont'd)

Later, in part IV the point is restated in footnote 7, quoted above.

17. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881-82, 894-95 (1983) (citations omitted).

CONCLUSION

Here Marathon's injury is a very particularized one, arising from the fact that it is "the very *object* of a law's requirement or prohibition." Marathon therefore fits squarely within that group of plaintiffs who, when they seek to challenge an agency's action as being prohibited by law, should "always have standing."

The lower courts' rulings in this case indicate how far afield those courts have strayed in interpreting and applying this Court's standing decisions. By failing to apply this Court's *Bennett* and *Lujan II* decisions, the district and circuit courts have abrogated their responsibility to perform their historic function of determining whether administrative actions that injure private parties are consistent with applicable law.

When the courts refuse to perform their constitutional duty of reviewing agency actions in proper cases the effect is to free the agency from the policies and procedures mandated by Congress.

This Court should grant the petition to ensure that the lower courts in this case — and in innumerable others like it — apply constitutional standing principles to preserve, rather than undermine, the proper separation of powers among the three branches of government.

Respectfully submitted,

CRAIG R. CARVER
Counsel of Record
DON H. SHERWOOD
ALFERS & CARVER, LLC
730 17th Street
Suite 340
Denver, CO 80202
(303) 592-7674

PATRICK G. PITET
Region Counsel
MARATHON OIL COMPANY
1501 Stampede Avenue
Cody, WY 82414-4721
(307) 527-3275

Attorneys for Petitioner

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED JANUARY 6, 1999

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No, 97-1254
(D.C. No. 97-AP-266)
(District of Colorado)

MARATHON OIL COMPANY, an Ohio company,

Plaintiff-Appellant,

v.

BRUCE BABBITT, Secretary of the United States Department of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; BUREAU OF LAND MANAGEMENT,

Defendants-Appellees,

COLORADO ENVIRONMENTAL COALITION, a non-profit Colorado corporation; WILDERNESS SOCIETY, a non-profit District of Columbia corporation,

Defendants-Intervenors-Appellees.

Appendix A

ORDER AND JUDGMENT*

Before **PORFILIO**, **HOLLOWAY**, and **HENRY**, Circuit Judges.

Marathon Oil Company appeals the district court's dismissal of its action filed to obtain an order directing the Secretary of the Interior to restore lands once designated for federal oil and gas leasing but later removed for environmental review. The district court held Marathon lacked standing, having alleged no redressable injury. ***Marathon Oil Co. v. Babbitt***, 966 F. Supp. 1024 (D. Colo. 1997). Although the district court's conclusion is unimpeachably supported by a venerable line of Tenth Circuit precedent, Marathon seeks to avoid that authority by recasting this case as an effort to curtail the Secretary's "unlimited power" in executive decision-making. We affirm substantially for the reasons given by the district court.

The district court correctly relied on ***Ash Creek Mining Co. v. Lujan***, 969 F.2d 868 (10th Cir. 1992); ***Wyoming ex rel. Sullivan v. Lujan***, 969 F.2d 877 (10th Cir. 1992); ***Mount Evans Co. v. Madigan***, 14 F.3d 1444 (10th Cir. 1994); and ***Baca v. King***, 92 F.3d 1031 (10th Cir. 1996), each holding plaintiffs lacked standing because their injuries were not redressable by a favorable decision. The district court found Marathon's position indistinguishable from that

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

of ***Baca***, ***Ash Creek Mining***, and ***Wyoming*** and dismissed the action, notwithstanding Marathon's insistence ***Lujan v. Defenders of Wildlife***, 504 U.S. 555 (1992), would permit jurisdiction in its case.

On appeal, Marathon argues the district court did not give proper consideration to the facts pled in its complaint or contained in the administrative record, all of which must be construed in plaintiff's favor. Marathon insists "the facts pled by Marathon establish that Marathon's injury will 'likely' be redressed by a declaration of the challenged policy's illegality."

The crux of Marathon's argument is the district court applied the wrong redressability test, albeit derived from our cases, but ignorant of Justice Scalia's plurality opinion in ***Defenders of Wildlife***, as fully refined and articulated in the unanimous holding of ***Bennett v. Spear***, 520 U.S. 154, 117 S. Ct. 1154 (1997). Marathon urges ***Defenders*** and ***Bennett*** have articulated a less stringent redressability test which does not require as direct an injury to establish standing as our prior cases have dictated. We disagree.

Both ***Defenders*** and ***Bennett*** are Endangered Species Act (ESA) cases in which the Court sought to delimit the standing provision within that statutory scheme. In ***Defenders***, noting standing requirements are "not mere pleading requirements but rather an indispensable part of the plaintiff's case," 112 S. Ct. at 2136, each element requiring support in the same way as plaintiff would bear any other burden of proof, the Court also observed the burden is different when plaintiff is himself the object of

the injury and when "plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed." ***Id.*** at 2137. The court concluded plaintiffs could not establish injury because even if the district court had issued the orders requested, they would not have bound other agencies involved in the alleged illegal action. In that case, only the various funding agencies could ultimately implement the order, and none was a party to the action or provided enough funding in any case. We agree with the district court's conclusion this case is inapposite.

Bennett, again addressing the particular facts presented under the ESA's standing provision, held that injuries alleged by two Oregon irrigation districts and operators of two ranches within the districts were within the ESA's zone of interest permitting citizen suits. The harm alleged in ***Bennett*** was economic, deriving from a challenge to the Secretary's restricting water flows essential to their operations but harmful to the Lost River Sucker and Shortnose Sucker. The Court read broadly the "any person" threshold for standing under the ESA, permitting those challenging and those protecting an environmental action to be viewed within the same zone of interest. Given plaintiffs' allegations, the Court found the injury alleged was fairly traceable to the agency's action. Because of the absence of economic harm in this case, however, we believe ***Bennett*** is not germane.

The jurisprudence of standing "is a highly case-specific endeavor, turning on the precise allegations of the parties seeking relief." ***Wyoming***, 969 F.2d at 882. We are satisfied,

however, this case falls in step with its Tenth Circuit precursors. ***See also State of Utah v. Babbitt***, 137 F.3d 1193 (10th Cir. 1998).

AFFIRMED.

ENTERED FOR THE COURT

John C. Porfilio
Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO ON MOTION TO DISMISS DATED AND FILED JUNE 16, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 97-AP-266

MARATHON OIL COMPANY, an Ohio corporation,

Plaintiff,

v.

BRUCE BABBITT, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; the UNITED STATES DEPARTMENT OF THE INTERIOR, and the BUREAU OF LAND MANAGEMENT,

Defendants,

v.

COLORADO ENVIRONMENTAL COALITION, a non-profit Colorado corporation, and THE WILDERNESS SOCIETY, a non-profit District of Colombia corporation,

Intervenor-Defendants.

ORDER ON MOTION TO DISMISS

Appendix B

KANE, J.

Marathon Oil Company asserts the Defendants have breached their legal duties in depriving it of its right to bid competitively on oil and gas lease tracts which ought, under governing law and the Secretary of the Department of Interior's (the "Secretary's") own regulations, to have been offered for sale.

Pending are the Federal Defendants' motion to dismiss and Marathon's brief in support of its right to conduct deposition discovery. I grant the Defendants' motion and therefore do not reach the issue of additional discovery.

The Defendants assert the only way in which Marathon's grievance can be redressed is by this court issuing an order requiring the Secretary to offer the disputed parcels of land for competitive oil and gas leasing under the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 *et seq.* They move to dismiss the case under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on the grounds that Marathon lacks standing because this court cannot redress its claim.

The Defendants rely on four recent Tenth Circuit opinions, *Ash Creek Mining Company v. Lujan*, 969 F.2d 868 (10th Cir. 1992); *Wyoming ex rel. Sullivan v. Lujan* 969 F.2d 877 (10th Cir. 1992); *Mount Evans Company v. Madigan*, 14 F.3d 1444 (10th Cir. 1994); and *Baca v. King*, 92 F.3d 1031 (10th Cir. 1996). They assert the Tenth Circuit has repeatedly held in these cases that "federal courts do not have the power to order competitive leasing. By law

that discretion is vested absolutely in the federal government's executive branch and not in its judiciary." *See Wyoming*, 969 F.2d at 882.

Marathon argues the Supreme Court opinion in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), on which the Tenth Circuit relied in the *Ash Creek* and *Wyoming* cases, provides a basis of redressability, notwithstanding the court of appeals' holdings. I disagree. The Court remarked that, where the government action or inaction complained of was directed at a third party not before the court, rather than at the complainant before the court, the complainant's claim would frequently fail for lack of redressability because the court would have no control over the third party as a practical matter. *Id.*, at 561-62. It was not the Supreme Court's holding, however, that there is a difference between a third party complaining of a government action directed at someone else and a first party directly affected where all the necessary parties are before the court.

For standing purposes, Marathon's position here is indistinguishable from that of the plaintiff in *Ash Creek* who complained about the public land being devoted to some other use due to a previous agreement between the government and several other parties. Likewise, Marathon's status is not dissimilar to that of the plaintiff in *Wyoming*, where the state sought to challenge the Secretary's exchange of federally owned coal in Wyoming for a conservation easement in a national park.

Nor, for jurisdictional purposes, does Marathon differ from the plaintiff in *Baca*, the most recent of the Tenth Circuit decisions on which the Defendants rely, and which itself cited *Lujan v. Defenders of Wildlife*. Baca, a lessee of federal land that the government exchanged for private land in a monument and conservation area, challenged the land exchange which resulted in his loss of grazing privileges. The appeals court cited the statement in *Lujan v. Defenders of Wildlife*, that the constitutional limitation on federal court jurisdiction in Article III requires:

> (1) that the plaintiff "suffered an 'injury in fact' . . . (2) that the injury is " 'fairly . . . trac[able] to the challenged action of the defendant . . .' " and (3) that it is " 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' "

Baca, 92 F.3d at 1035 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61) (citations and some internal quotation marks omitted).

Assuming satisfaction of the first two requirements for standing, Marathon has not shown a "substantial likelihood" that its injury will be redressed by a favorable decision. *See Baca*, 92 F.3d at 1036. Only an order of this court compelling the executive branch to make land available for competitive leasing under the Mineral Leasing Act would likely redress Marathon's claimed injuries. This, I do not have the power to do. I therefore dismiss the case for lack of standing. Accordingly,

Appendix B

IT IS ORDERED THAT the Federal Defendants' Motion to Dismiss is GRANTED and this case is DISMISSED with each party to pay its own costs.

Dated this 16 day of June, 1997, at Denver, Colorado.

s/ John L. Kane, Jr.
JOHN L. KANE, JR.
U.S. SENIOR DISTRICT COURT
JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 9, 1999

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 97-1254

MARATHON OIL COMPANY, an Ohio company,

Plaintiff – Appellant,

v.

BRUCE BABBITT, Secretary of the United States Department of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; BUREAU OF LAND MANAGEMENT;

Defendant – Appellee,

COLORADO ENVIRONMENTAL COALITION, a non-profit Colorado corporation; WILDERNESS SOCIETY, a non-profit District of Columbia corporation,

Defendants-Intervenors-Appellee.

ORDER

Filed March 9, 1999

Appendix C

Before **PORFILIO**, **HOLLOWAY**, and **HENRY**, Circuit Judges.

Appellant's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ Audrey F. Weigel
Deputy Clerk

APPENDIX D — RELEVANT STATUTES

43 U.S.C. § 1701

§ 1701. Congressional declaration of policy

(a) The Congress declares that it is the policy of the United States that —

(1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;

(2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

(3) public lands not previously designated for any specific use and all existing classifications of public lands that were effected by executive action or statute before October 21, 1976, be reviewed in accordance with the provisions of this Act;

(4) the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action;

(5) in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking;

(6) judicial review of public land adjudication decisions be provided by law;

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

(9) the United States receive fair market value of the use of the public lands and their

resources unless otherwise provided for by statute;

(10) uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands be established by statute, requiring each disposal, acquisition, and exchange to be consistent with the prescribed mission of the department or agency involved, and reserving to the Congress review of disposals in excess of a specified acreage;

(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;

(12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands; and

(13) the Federal Government should, on a basis equitable to both the Federal and local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation.

(b) The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.

* * *

43 U.S.C. § 1702

§ 1702. Definitions

Without altering in any way the meaning of the following terms as used in any other statute, whether or not such statute is referred to in, or amended by, this Act, as used in this Act —

(a) The term "areas of critical environmental concern" means areas within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards.

(b) The term "holder" means any State or local governmental entity, individual, partnership, corporation, association, or other business entity receiving or using a right-of-way under subchapter V of this chapter.

(c) The term "multiple use" means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

(d) The term "public involvement" means the opportunity for participation by affected citizens in rulemaking, decisionmaking, and planning with respect to the public lands, including public meetings or hearings held at locations near the affected lands, or advisory mechanisms, or such other procedures as may be necessary to provide public comment in a particular instance.

(e) The term "public lands" means any land and interest in land owned by the United States within the several States

and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except —

(1) lands located on the Outer Continental Shelf; and

(2) lands held for the benefit of Indians, Aleuts, and Eskimos.

(f) The term "right-of-way" includes an easement, lease, permit, or license to occupy, use, or traverse public lands granted for the purpose listed in subchapter V of this chapter.

(g) The term "Secretary", unless specifically designated otherwise, means the Secretary of the Interior.

(h) The term "sustained yield" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use.

(i) The term "wilderness" as used in section 1782 of this title shall have the same meaning as it does in section 1131(c) of Title 16.

(j) The term "withdrawal" means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for

a particular public purpose or program; or transferring jurisdiction over an area of Federal land, other than "property" governed by the Federal Property and Administrative Services Act, as amended (40 U.S.C. 472) from one department, bureau or agency to another department, bureau or agency.

(k) An "allotment management plan" means a document prepared in consultation with the lessees or permittees involved, which applies to livestock operations on the public lands or on lands within National Forests in the eleven contiguous Western States and which:

(1) prescribes the manner in, and extent to, which livestock operations will be conducted in order to meet the multiple-use, sustained-yield, economic and other needs and objectives as determined for the lands by the Secretary concerned; and

(2) describes the type, location, ownership, and general specifications for the range improvements to be installed and maintained on the lands to meet the livestock grazing and other objectives of land management; and

(3) contains such other provisions relating to livestock grazing and other objectives found by the Secretary concerned to be consistent with the provisions of this Act and other applicable law.

(*l*) The term "principal or major uses" includes, and is limited to, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production.

(m) The term "department" means a unit of the executive branch of the Federal Government which is headed by a member of the President's Cabinet and the term "agency" means a unit of the executive branch of the Federal Government which is not under the jurisdiction of a head of a department.

(n) The term "Bureau" means the Bureau of Land Management.

(*o*) The term "eleven contiguous Western States" means the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

(p) The term "grazing permit and lease" means any document authorizing use of public lands or lands in National Forests in the eleven contiguous western States for the purpose of grazing domestic livestock.

* * *

Appendix D

43 U.S.C. § 1711

§ 1711. Continuing inventory and identification of public lands; preparation and maintenance

(a) The Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern. This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values. The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands.

(b) As funds and manpower are made available, the Secretary shall ascertain the boundaries of the public lands; provide means of public identification thereof including, where appropriate, signs and maps; and provide State and local governments with data from the inventory for the purpose of planning and regulating the uses of non-Federal lands in proximity of such public lands.

* * *

Appendix D

43 U.S.C. § 1712

§ 1712. Land use plans

(a) Development, maintenance, and revision by Secretary

The Secretary shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.

(b) Coordination of plans for National Forest System lands with Indian land use planning and management programs for purposes of development and revision

In the development and revision of land use plans, the Secretary of Agriculture shall coordinate land use plans for lands in the National Forest System with the land use planning and management programs of and for Indian tribes by, among other things, considering the policies of approved tribal land resource management programs.

(c) Criteria for development and revision

In the development and revision of land use plans, the Secretary shall —

(1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;

(2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;

(3) give priority to the designation and protection of areas of critical environmental concern;

(4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;

(5) consider present and potential uses of the public lands;

(6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;

(7) weigh long-term benefits to the public against short-term benefits;

(8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and

(9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under the Act of September 3, 1964 (78 Stat. 897), as amended [16 U.S.C.A. § 460*l*-4 et seq.], and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of

land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

(d) Review and inclusion of classified public lands; review of existing land use plans; modification and termination of classifications

Any classification of public lands or any land use plan in effect on October 21, 1976, is subject to review in the land use planning process conducted under this section, and all public lands, regardless of classification, are subject to inclusion in any land use plan developed pursuant to this section. The Secretary may modify or terminate any such classification consistent with such land use plans.

(e) Management decisions for implementation of developed or revised plans

The Secretary may issue management decisions to implement land use plans developed or revised under this section in accordance with the following:

(1) Such decisions, including but not limited to exclusions (that is, total elimination) of one or more of the principal or major uses made by a

management decision shall remain subject to reconsideration, modification, and termination through revision by the Secretary or his delegate, under the provisions of this section, of the land use plan involved.

(2) Any management decision or action pursuant to a management decision that excludes (that is, totally eliminates) one or more of the principal or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more shall be reported by the Secretary to the House of Representatives and the Senate. If within ninety days from the giving of such notice (exclusive of days on which either House has adjourned for more than three consecutive days), the Congress adopts a concurrent resolution of nonapproval of the management decision or action, then the management decision or action shall be promptly terminated by the Secretary. If the committee to which a resolution has been referred during the said ninety day period, has not reported it at the end of thirty calendar days after its referral, it shall be in order to either discharge the committee from further consideration of such resolution or to discharge the committee from consideration of any other resolution with respect to the management decision or action. A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the

committee has reported such a resolution), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be made with respect to any other resolution with respect to the same management decision or action. When the committee has reprinted, or has been discharged from further consideration of a resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(3) Withdrawals made pursuant to section 1714 of this title may be used in carrying out management decisions, but public lands shall be removed from or restored to the operation of the Mining Law of 1872, as amended (R.S. 2318-2352; 30 U.S.C. 21 et seq.) or transferred to another department, bureau, or agency only by withdrawal action pursuant to section 1714 of this title or other action pursuant to applicable

law: *Provided*, That nothing in this section shall prevent a wholly owned Government corporation from acquiring and holding rights as a citizen under the Mining Law of 1872.

(f) Procedures applicable to formulation of plans and programs for public land management

The Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.

* * *

43 U.S.C. § 1714

§ 1714. Withdrawals of lands

(a) Authorization and limitation; delegation of authority

On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section. The Secretary may delegate this withdrawal authority only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate.

Appendix D

(b) Application and procedures applicable subsequent to submission of application

(1) Within thirty days of receipt of an application for withdrawal, and whenever he proposes a withdrawal on his own motion, the Secretary shall publish a notice in the Federal Register stating that the application has been submitted for filing or the proposal has been made and the extent to which the land is to be segregated while the application is being considered by the Secretary. Upon publication of such notice the land shall be segregated from the operation of the public land laws to the extent specified in the notice. The segregative effect of the application shall terminate upon (a) rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) the expiration of two years from the date of the notice.

(2) The publication provisions of this subsection are not applicable to withdrawals under subsection (e) hereof.

(c) Congressional approval procedures applicable to withdrawals aggregating five thousand acres or more

(1) On and after October 21, 1976, a withdrawal aggregating five thousand acres or more may be made (or such a withdrawal or any other withdrawal involving in the aggregate five thousand acres or more which terminates after such date of approval may be extended) only for a period of not more than twenty years by the Secretary on his own motion or upon request by a department or agency head. The Secretary shall notify both Houses of Congress of such a withdrawal no later than its effective date and the

withdrawal shall terminate and become ineffective at the end of ninety days (not counting days on which the Senate or the House of Representatives has adjourned for more than three consecutive days) beginning on the day notice of such withdrawal has been submitted to the Senate and the House of Representatives, if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal. If the committee to which a resolution has been referred during the said ninety day period, has not reported it at the end of thirty calendar days after its referral, it shall be in order to either discharge the committee from further consideration of such resolution or to discharge the committee from consideration of any other resolution with respect to the Presidential recommendation. A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported such a resolution), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be made with respect to any other resolution with respect to the same Presidential recommendation. When the committee has reprinted, or has been discharged from further consideration of a resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall

not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(2) With the notices required by subsection (c)(1) of this section and within three months after filing the notice under subsection (e) of this section, the Secretary shall furnish to the committees —

(1) a clear explanation of the proposed use of the land involved which led to the withdrawal;

(2) an inventory and evaluation of the current natural resource uses and values of the site and adjacent public and nonpublic land and how it appears they will be affected by the proposed use, including particularly aspects of use that might cause degradation of the environment, and also the economic impact of the change in use on individuals, local communities, and the Nation;

(3) an identification of present users of the land involved, and how they will be affected by the proposed use;

(4) an analysis of the manner in which existing and potential resource uses are incompatible with or in conflict with the proposed use, together with a statement of the provisions to be made for continuation or termination of existing uses, including an

economic analysis of such continuation or termination;

(5) an analysis of the manner in which such lands will be used in relation to the specific requirements for the proposed use;

(6) a statement as to whether any suitable alternative sites are available (including cost estimates) for the proposed use or for uses such a withdrawal would displace;

(7) a statement of the consultation which has been or will be had with other Federal departments and agencies, with regional, State, and local government bodies, and with other appropriate individuals and groups;

(8) a statement indicating the effect of the proposed uses, if any, on State and local government interests and the regional economy;

(9) a statement of the expected length of time needed for the withdrawal;

(10) the time and place of hearings and of other public involvement concerning such withdrawal;

(11) the place where the records on the withdrawal can be examined by interested parties; and

(12) a report prepared by a qualified mining engineer, engineering geologist, or geologist which shall include but not be limited to information on: general geology, known mineral deposits, past and present mineral production, mining claims, mineral leases, evaluation of future mineral potential, present and potential market demands.

(h) Public hearing required for new withdrawals

All new withdrawals made by the Secretary under this section (except an emergency withdrawal made under subsection (e) of this section) shall be promulgated after an opportunity for a public hearing.

* * *

43 U.S.C. § 1732

§ 1732. Management of use, occupancy, and development of public lands

(a) Multiple use and sustained yield requirements applicable; exception

The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.

Appendix D

(b) Easements, permits, etc., for utilization through habitation, cultivation, and development of small trade or manufacturing concerns; applicable statutory requirements

In managing the public lands, the Secretary shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such law, regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands, including, but not limited to, long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns: *Provided*, That unless otherwise provided for by law, the Secretary may permit Federal departments and agencies to use, occupy, and develop public lands only through rights-of-way under section 1767 of this title, withdrawals under section 1714 of this title, and, where the proposed use and development are similar or closely related to the programs of the Secretary for the public lands involved, cooperative agreements under section 1737(b) of this title: *Provided further*, That nothing in this Act shall be construed as authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System and adjacent waters or as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife. However, the Secretary concerned may designate areas of public land and of lands in the National Forest System where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety,

administration, or compliance with provisions of applicable law. Except in emergencies, any regulations of the Secretary concerned relating to hunting and fishing pursuant to this section shall be put into effect only after consultation with the appropriate State fish and game department. Nothing in this Act shall modify or change any provision of Federal law relating to migratory birds or to endangered or threatened species. Except as provided in section 1744, section 1782, and subsection (f) of section 1781 of this title and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress. In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

(c) Revocation or suspension provision in instrument authorizing use, occupancy or development; violation of provision; procedure applicable

The Secretary shall insert in any instrument providing for the use, occupancy, or development of the public lands a provision authorizing revocation or suspension, after notice and hearing, of such instrument upon a final administrative finding of a violation of any term or condition of the instrument, including, but not limited to, terms and conditions requiring compliance with regulations under Acts applicable to the public lands and compliance with applicable State or Federal air or water quality standard or implementation plan: *Provided*, That such violation

occurred on public lands covered by such instrument and occurred in connection with the exercise of rights and privileges granted by it: *Provided further*, That the Secretary shall terminate any such suspension no later than the date upon which he determines the cause of said violation has been rectified: *Provided further*, That the Secretary may order an immediate temporary suspension prior to a hearing or final administrative finding if he determines that such a suspension is necessary to protect health or safety or the environment: *Provided further*, That, where other applicable law contains specific provisions for suspension, revocation, or cancellation of a permit, license, or other authorization to use, occupy, or develop the public lands, the specific provisions of such law shall prevail.

* * *

43 U.S.C. § 1782

§ 1782. Bureau of Land Management Wilderness Study

(a) Lands subject to review and designation as wilderness

Within fifteen years after October 21, 1976, the Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by section 1711(a) of this title as having wilderness characteristics described in the Wilderness Act of September 3, 1964 (78 Stat. 890; 16 U.S.C. 1131 et seq.) and shall from time to time report to the President his recommendation as to the suitability or

nonsuitability of each such area or island for preservation as wilderness: *Provided*, That prior to any recommendations for the designation of an area as wilderness the Secretary shall cause mineral surveys to be conducted by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present in such areas: *Provided further*, That the Secretary shall report to the President by July 1, 1980, his recommendations on those areas which the Secretary has prior to November 1, 1975, formally identified as natural or primitive areas. The review required by this subsection shall be conducted in accordance with the procedure specified in section 3(d) of the Wilderness Act [16 U.S.C.A. § 1132(d)].

(b) Presidential recommendation for designation as wilderness

The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendations with respect to designation as wilderness of each such area, together with a map thereof and a definition of its boundaries. Such advice by the President shall be given within two years of the receipt of each report from the Secretary. A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress.

(c) Status of lands during period of review and determination

During the period of review of such areas and until Congress has determined otherwise, the Secretary shall

continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976: *Provided*, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection. Unless previously withdrawn from appropriation under the mining laws, such lands shall continue to be subject to such appropriation during the period of review unless withdrawn by the Secretary under the procedures of section 1714 of this title for reasons other than preservation of their wilderness character. Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act [16 U.S.C.A. § 1131 et seq.] which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated area, including mineral surveys required by section 4(d)(2) of the Wilderness Act [16 U.S.C.A. § 1133(d)(2)], and mineral development, access, exchange of lands, and ingress and egress for mining claimants and occupants.

* * * *

APPENDIX E — LETTER OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT DATED JANUARY 8, 1997

United States Department of the Interior
BUREAU OF LAND MANAGEMENT
Colorado State Office
2850 Youngfield Street
Lakewood, Colorado 80215-7076

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JAN 08 1997

CERTIFIED MAIL

E. M. Dauernheim
Exploitation Manager
Rocky Mountain Region
Marathon Oil Company
1501 Stampede Avenue
Cody, Wyoming 82414-4721

Appendix E

Dear Mr. Dauernheim:

We received your letter dated November 15, 1996, in which you protested the Bureau of Land Management (BLM) decision to amend and/or delete the competitive oil and gas lease sale parcels noted above from the competitive sale held November 14, 1996. Lands contained in those parcels are located within an area which has been proposed by the Colorado Environmental Coalition (CEC) and numerous endorsing organizations for wilderness designation in the *Conservationists' Wilderness Proposal for BLM Lands*.

Approximately 800,000 acres in Colorado were designated as wilderness study areas (WSAs) in 1980, following considerable public involvement. Subsequently, with further study and additional public input, about half of these areas were recommended to Congress for designation as wilderness. Section 603(c) of FLPMA provides direction to BLM for management of lands under wilderness review as follows:

During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law so as not to impair the suitability of such areas for preservation as wilderness. . .

The entire 800,000 acres designated as WSAs are managed accordingly until such time as Congress designates them as wilderness or releases them from further study.

As to areas that have been proposed for wilderness designation by CEC and endorsing organizations, there has been no formal administrative guidance for protection of

wilderness values in non-WSA areas. Because this situation also occurs in a number of other states as well, the Department is developing a policy pertaining to this issue.

In the meantime, BLM will continue to manage these lands in accordance with the land use planning decisions made in Resource Management Plans (RMPs); however, the implementation of oil and gas leasing decisions in these areas will he held in abeyance, pending further evaluation by the Department. Special care will be taken to consider natural values in the development of alternatives and analysis of impacts in our environmental assessments for actions proposed or considered in these areas as well.

Lands located within the proposed areas, whether requested informally or by noncompetitive offer to lease, will not be offered for competitive oil and gas leasing at this time. Parties to this case who have been adversely affected by this decision may appeal to the Interior Board of Land Appeals in accordance with Title 43 of the Code of Federal Regulations, Part 4.400, and enclosed form CSO 1840-6. If an appeal is taken, the notice of appeal must be filed in this office at the above address within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

In the event of appeal, the following parties may be adversely affected:

Norm Mullen
Western Colorado Representative
Colorado Environmental Coalition
Western Colorado Office
Box 2583
Grand Junction, Colorado 81502

Appendix E

Edward B. Zukoski
Staff Attorney
Land and Water Fund
2260 Baseline Road, Suite 200
Boulder, Colorado 80302

Should you have questions concerning this protest response, please contact Kermit Witherbee of this office at (303) 239-3753.

Sincerely,

s/ Robert V. Abbey
Robert V. Abbey
Acting State Director

Enclosure

cc:
Norm Mullen
Western Colorado Representative
Colorado Environmental Coalition
Western Colorado Office
Box 2583
Grand Junction, Colorado 81502

Edward B. Zukoski
Staff Attorney
Land and Water Fund
2260 Baseline Road, Suite 200
Boulder, Colorado 80302

Supreme Court, U.S.
FILED
AUG 6 1999
OFFICE OF THE CLERK

No. 98-1952

In the Supreme Court of the United States

MARATHON OIL COMPANY, PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
ROBERT L. KLARQUIST
JEFFREY C. DOBBINS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

10 PP

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner lacked standing to compel the Secretary of the Interior to offer particular public lands for oil and gas leasing.

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In the Supreme Court of the United States

No. 98-1952

MARATHON OIL COMPANY, PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unpublished, but the decision is noted at 166 F.3d 1221 (Table). The opinion of the district court (Pet. App. 6a-10a) is reported at 966 F. Supp. 1024.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1999. A petition for rehearing was denied on March 9, 1999 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on June 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, local Bureau of Land Management (BLM) offices prepare Resource Management Plans (RMPs) that establish the uses for which federal land under BLM's jurisdiction is to be managed. See, *e.g.*, 43 C.F.R. Pt. 1600, Subpt. 1610. Along with preparation of a RMP, FLPMA required BLM to conduct a 15-year "wilderness study" identifying those areas of public lands "having wilderness characteristics" as described in the Wilderness Act of 1964, 16 U.S.C. 1131 *et seq.*, and to recommend to Congress specific areas appropriate for designation as wilderness. 43 U.S.C. 1782(a) and (b). Areas not designated as wilderness are typically available for leasing under the Mineral Leasing Act (MLA), 30 U.S.C. 181 *et seq.* The MLA does not require, however, that land be leased in any particular circumstance. Rather, the MLA provides that "[a]ll lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits *may* be leased by the Secretary." 30 U.S.C. 226(a) (emphasis added).

2. In 1991, the Colorado office of BLM completed its 15-year wilderness inventory. In 1993, BLM transmitted to Congress its conclusion that some 400,000 acres of land were appropriate for wilderness designation. In early 1994, the Colorado Environmental Coalition (CEC) wrote BLM to suggest that BLM had improperly failed to include thousands of acres of public lands within its Wilderness Study Area. C.A. App. 302-317. Recognizing that oil and gas production on federal lands could limit or destroy their potential value as wilderness, BLM concluded in 1996 that it would postpone any decisions to open the potential wilderness

areas identified by CEC to oil and gas leasing until it could develop a formal process for evaluating CEC's claims. See C.A. App. 209-210. BLM issued its formal policy in May 1997. C.A. Supp. App. 24-28. Pursuant to that policy, BLM conducted a comprehensive review of the lands identified by CEC, see C.A. Supp. App. 26-28, 40-48, and, on November 23, 1998, decided to initiate a process that could lead to formal amendments to existing RMPs.

In August 1996, petitioner wrote to BLM indicating that it was interested in bidding on several parcels of land in Moffat County, Colorado, and suggested that BLM should open those lands to competitive bidding for oil and gas leases during its next scheduled sale in November 1996. C.A. App. 138-147. On September 25, 1996, BLM announced that it would accept bids for leases on 66 parcels of land in Colorado, including many in which petitioner expressed an interest. C.A. App. 149-194. The first page of the notice announcing the sale contained the following clause: "RIGHT TO WITHDRAW PARCELS: The Bureau of Land Management reserves the right to withdraw any or all parcels prior to or at the sale." C.A. App. 149.

Two weeks before the sale occurred, BLM realized that some of the properties being offered at the lease fell within the areas that CEC had identified as potential wilderness. See C.A. App. 213, 313-317. In order to remain consistent with its May 1997 policy of protecting the wilderness option by holding such lands in abeyance from leasing until the land could be evaluated, BLM, on November 6, 1996, issued addenda to the sale notice that removed nine parcels from the sale and amended two others. C.A. App. 196-200.

Petitioner filed an administrative appeal with the Interior Board of Land Appeals (IBLA). See C.A.

Supp. App. 1-23. Petitioner also filed this action in the district court, alleging that BLM's decision to withdraw the subject parcels from the sale unlawfully converted the property into wilderness without following the procedures necessary to permanently withdraw land for wilderness purposes. The district court dismissed the suit, holding that petitioner lacked standing because its alleged injuries could not be redressed by the court. Pet. App. 6a-10a.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-5a. The court of appeals concluded that the district court had properly relied on prior circuit precedent, which held that plaintiffs lacked standing to challenge the Secretary of the Interior's authority over the disposition of federal lands because their injuries were not redressable by a favorable judicial decision. *Id.* at 2a-3a. The court of appeals further concluded that nothing in this Court's decisions in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), and *Bennett* v. *Spear*, 520 U.S. 154 (1997), affected the holdings of the court of appeals' earlier decisions. Pet. App. 3a-4a.

4. Before the court of appeals issued its decision, the IBLA issued a decision in petitioner's administrative appeal. See *Marathon Oil Co.*, 139 I.B.L.A. 347 (1997). The IBLA concluded that, although BLM had authority to "eliminate specific parcels from leasing even where they had been designated in an RMP as generally suitable for leasing," such a decision should have been made only after a "site-specific analysis as to the particular parcels involved." *Id.* at 356. Because no such analysis had occurred in this case, the IBLA vacated BLM's decision and remanded the matter to BLM. *Ibid.*

On remand, BLM initiated the analysis ordered by the IBLA. BLM subsequently announced that it would proceed with a formal amendment to the existing RMP and would continue to hold all discretionary actions affecting the parcels, including oil and gas leasing, in abeyance pending completion of that plan. BLM Colo. State Office, BLM News Release (Nov. 23, 1998). Earlier this year, petitioner "appealed" that announcement to the IBLA. IBLA Docket No. 99-133. The IBLA has recently issued an order dismissing the appeal as unripe until BLM has had time to complete the land-use planning process. Order in IBLA Docket No. 99-133 (May 26, 1999).

ARGUMENT

1. This case does not present a controversy that is ripe for review by this Court or, indeed, by any court, in light of intervening administrative developments.[1] Before the IBLA, petitioner sought and received relief from the same BLM action that it challenged in the district court and the court of appeals. The IBLA vacated BLM's decision withdrawing the parcels at issue from the proposed sale and ruled that BLM could

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[1] Petitioner correctly notes (Pet. 2) that the government did not argue ripeness before the district court. At the time, however, the government did not believe that the IBLA had jurisdiction over an appeal from BLM's decision, see, *e.g.*, 139 I.B.L.A. at 350-356, and therefore agreed with petitioner not to raise the issue of ripeness in the district court, C.A. App. 366, 513. That agreement, however, explicitly did not extend to any future dispositive motions, see *id.* at 366, and the government argued that the case was unripe in the court of appeals. Gov't C.A. Br. 14-18. In any event, this Court is "obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction." *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 278 (1977) (citing *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 740 (1976)).

not permanently refuse to offer parcels of land for leasing without site-specific analysis describing why such a limitation is appropriate. See 139 I.B.L.A. at 356-357. As a result, there no longer is "final agency action" subject to challenge under the Administrative Procedure Act (APA), 5 U.S.C. 704, on the ground petitioner raised below, much less action that is ripe for judicial review. In short, the IBLA, at petitioner's behest, has already granted the same relief that a court may grant in a challenge to agency action under the APA. See 5 U.S.C. 706(2) (reviewing court shall "hold unlawful and set aside" agency action found to be arbitrary, capricious, or otherwise contrary to law).

Furthermore, on November 23, 1998, BLM issued a statement indicating that the agency intended to initiate the process of amending existing RMPs to determine whether the property in question should remain open to leasing in the future (as it is now), or whether it is more appropriately characterized as wilderness, in which case it would be permanently withheld from leasing under the MLA. BLM Colo. State Office, BLM News Release (Nov. 23, 1998). Depending on the outcome of that administrative process, all, some, or none of the parcels at issue here may be opened to leasing in the near future. And after that process is complete, petitioner will have the opportunity to challenge any leasing decisions or other decisions that affect the land at issue here, to the extent consistent with applicable justiciability requirements. See, *e.g.*, *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726 (1998). Thus, until the administrative process is complete, there will be no "final" agency action ripe for

review. 5 U.S.C. 704; see *Abbott Lab.* v. *Gardner*, 387 U.S. 136, 149-150 (1967).[2]

2. Even if this case involved "final agency action" and it was ripe for review, the court of appeals' unpublished decision would not merit this Court's review. The decision merely applies previous circuit precedent, Pet. App. 2a-3a, and is therefore not likely to be cited in future cases. See 10th Cir. R. 36.3. Moreover, petitioner identifies no conflict in the circuits on the question presented. Until such a conflict arises, this Court need not devote its time to addressing what is, even accepting petitioner's arguments, merely a single erroneous unpublished decision. See Sup. Ct. R. 10(a).[3]

3. In any event, the court of appeals properly concluded that petitioner lacked standing to challenge BLM's decision not to offer the parcels of public lands at issue for leasing at this time.

a. Petitioner argues (Pet. 19-23) that, although BLM retains the discretion whether to lease the subject lands, under this Court's decision in *FEC* v. *Akins*, 524 U.S. 11, 23 (1998), it has standing to challenge BLM's

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[2] Petitioner therefore errs in contending (Pet. 11-12) that the court of appeals' decision conflicts with *Ohio Forestry Ass'n*, 523 U.S. at 738-739, because petitioner here challenges a "final BLM decision to close a specific area to oil and gas leasing." No such final decision has yet been made.

[3] Petitioner contends (Pet. 12-13) that the court of appeals' decision conflicts with the Tenth Circuit's decision in *Utah* v. *Babbitt*, 137 F.3d 1193 (1998), in which the court of appeals found that the plaintiffs had standing to raise procedural challenges under FLPMA. Any conflict between the court of appeals' decision and *Utah* v. *Babbitt*, however, would not merit this Court's review, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957), especially since the decision in *Utah* v. *Babbitt* is published and therefore would presumably take precedence over the unpublished decision in this case.

exercise of discretion as violating the requirements under FLPMA applicable to the elimination or withdrawal of public lands from mineral exploration and production. That contention, however, mischaracterizes the nature of and legal basis for BLM's action.

When BLM decided to remove the parcels from the 1996 sale, it did not permanently bar leasing on those properties; rather, the agency merely concluded that, under the MLA, the parcels should not be leased out immediately so that their status (as available for possible leasing) could be reevaluated in light of the claims advanced by CEC. BLM's decision therefore was not action taken pursuant to FLPMA, whose requirements do not even apply to limitations on leasing.[4] Moreover, as discussed above, petitioner will have the opportunity to raise procedural or substantive challenges under FLPMA, if any, after BLM reaches a final decision regarding the use of the property, as reflected in any amendment to the existing RMP.

b. The court of appeals also properly held that petitioner's claims are not redressable by a favorable decision setting aside BLM's decision not to lease the subject lands as part of the 1996 sale. Petitioner asserts (Pet. 24-25) that a judicial victory "would result in the lands [petitioner] seeks being once more made available for lease, thus redressing its injury." Petitioner cannot demonstrate, however, that a victory on the merits of this case—which presumably would set

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[4] Under FLPMA, withdrawals are limits on "settlement," "location," "sale," and "entry" of public lands. 43 U.S.C. 1702(j). As this Court noted with respect to an identically-worded withdrawal provision, none of those terms include leasing, which does not involve a "transfer of title." *Udall* v. *Tallman*, 380 U.S. 1, 19-20 (1965).

aside BLM's decision because it was based on what petitioner alleges to have been an "unpublished policy" (Pet. 6) of refusing to lease lands upon a complaint by CEC—would lead the Secretary to open the lands for leasing. Following such a judicial ruling setting aside its prior decision, BLM would be free to decide not to lease the lands based on another, lawful ground. And indeed, BLM has *already* made such a decision on a temporary basis, pending its consideration of possible amendments to the RMP. Compare *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 145-146 (1940); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 n.21 (1983).

At this point, the only "injury" suffered by petitioner is an injury tied to the Secretary's exercise of his discretion over whether to lease the particular parcels of land at issue at the present time. No statutory or regulatory provision, however, requires the Secretary to offer that land for lease at any particular time. The MLA vests the Secretary with the "discretion to refuse to issue any lease at all on a given tract." *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965); accord *United States ex rel. McLennan* v. *Wilbur*, 283 U.S. 414, 419 (1931) ("there is ground for a plausible, if not conclusive, argument" that the MLA "goes no further than to empower the Secretary to execute leases which, exercising a reasonable discretion, he may think would promote the public welfare"); *Arnold* v. *Morton*, 529 F.2d 1101, 1105-1106 (9th Cir. 1976) ("Secretary has no obligation to issue any lease on public lands"); *Schraier* v. *Hickel*, 419 F.2d 663, 665-667 (D.C. Cir. 1969) ("The fact that the Bureau published a notice that it would receive offers to lease did not preclude a later exercise of discretion to decline to lease."). Courts therefore lack the power to "compel[] the executive branch to make land

available for competitive leasing under the [MLA]." Pet. App. 9a.[5]

Because the decision to offer land for leasing and the timing of that decision are within the Secretary's discretion, petitioner cannot demonstrate that the property it seeks to lease would likely be offered for lease even if it were successful on the merits of this suit. That conclusion is particularly warranted here, because BLM has since publicly decided that it will not lease the parcels for oil and gas development until its ongoing review is completed, because such action would irretrievably destroy their wilderness character. Under those circumstances, petitioner cannot demonstrate that the Secretary's evaluation of the "public welfare" (*McLennan*, 283 U.S. at 419) with respect to those properties would change at all in the absence of the challenged policy.[6]

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[5] The issue of redressability in this context resembles the issue under the APA of whether the agency decision is "committed to agency discretion by law," 5 U.S.C. 701(a)(2), and therefore not subject to judicial review. The MLA places no limits on the Secretary's decision not to open lands for leasing. It simply provides that the Secretary "may" open land for oil and gas leases. 30 U.S.C. 226(a). Furthermore, although FLPMA establishes procedures under which BLM identifies lands that may be available for oil and gas leasing, FLPMA neither locks in that future use nor specifies a time within which such leasing must occur. Absent "law to apply" regarding when lands must be offered for leasing, the decision not to issue oil and gas leases for particular land at a particular time is "committed to agency discretion by law" and not reviewable under the APA. See *Lincoln* v. *Vigil*, 508 U.S. 182, 190-191 (1993).

[6] Contrary to petitioner's assertion (Pet. 9-15), the court of appeals properly concluded that this case is distinguishable from *Bennett* v. *Spear*, 520 U.S. 154 (1997). In *Bennett*, the Court found that the petitioners had met their burden of showing that the Bureau of Reclamation "likely" would not impose water level

c. Petitioner also errs in arguing (Pet. 9-18, 24-28) that the court of appeals' decision is contrary to this Court's decision in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992). In *Defenders of Wildlife*, *id.* at 561-562, the Court stated that if "the plaintiff is himself an object of the action (or foregone action) at issue[,] there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." But cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 106 n. 7 (1998) (explaining that redressability does not "always exist[] when the defendant has directly injured the plaintiff").

Contrary to its assertions (Pet. 25-29), petitioner is not the "object" of BLM's decision to withhold the property from the pool of property subject to leasing pending its decision regarding a formal amendment to existing RMPs. That decision affects all companies that might have bid with (or outbid) petitioner for the property withheld from sale. Furthermore, as discussed above, petitioner may present a challenge to any formal amendment to the RMP after there is final agency action by BLM, if applicable justiciability requirements are met at that time.

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restrictions if the Fish and Wildlife Service's Biological Opinion were set aside. *Id.* at 171. The Court explained that the Service's Biological Opinion had a "powerful coercive" and "virtually determinative" effect on the Bureau, and that, until issuance of the Service's opinion, the Bureau had operated the water at issue in the same manner throughout the 20th century. *Id.* at 169-170. Here, petitioner has not alleged similar facts establishing that, absent the challenged policy, BLM would likely lease the properties sought by petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
ROBERT L. KLARQUIST
JEFFREY C. DOBBINS
Attorneys

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In The

Supreme Court of the United States

MARATHON OIL COMPANY,

Petitioner,

v.

BRUCE BABBITT, Secretary of the United States Department of the Interior,

UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

AMICI CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION, THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AND THE INDEPENDENT PETROLEUM ASSOCIATION OF THE MOUNTAIN STATES IN SUPPORT OF PETITIONERS

WILLIAM PERRY PENDLEY*
ADAM T. REEVES
**Counsel of Record*
MOUNTAIN STATES LEGAL FOUNDATION
707 Seventeenth St., Suite 3030
Denver, Colorado 80202
(303) 292-2021

Attorneys for *Amici Curiae*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether an affected party has standing to challenge an unpublished federal agency policy that provides for private *ex parte* agreements, in direct contravention of explicit statutory and regulatory authority, between the agency and private parties as to how public lands will be managed?

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AMICI CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION, THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AND THE INDEPENDENT PETROLEUM ASSOCIATION OF THE MOUNTAIN STATES IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation respectfully submits this *amici curiae* brief on behalf of itself, the Independent Petroleum Association of America, and the Independent Petroleum Association of the Mountain States. Pursuant to Supreme Court Rule 37(2)(a) this *amici curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICI CURIAE*

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private access to public lands for environmentally sound economic and recreational activity. MSLF's membership includes individuals

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[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), *amici curiae* represent that no counsel for any party authored this brief, in whole or in part, and that no person or entity, other than *amici curiae* and their members, made a monetary contribution for the preparation or submission of this brief.

and businesses from every State in the Union who regularly use public lands and participate in the public process of developing land management plans. MSLF's members thus rely heavily upon the regularized planning process and the regulatory stability provided by the completed planning documents prepared in accordance with the requirements of federal law.

The Independent Petroleum Association of the Mountain States ("IPAMS") is the regional trade association for the Rocky Mountain Region, representing the interests of independent oil and gas producers, service and supply companies, and companies that perform auxiliary services related to oil and gas development such as the gathering, transportation and marketing of petroleum products. IPAMS members operate in a 13-state area in the Rocky Mountain West, much of which is public land, including Colorado, New Mexico, Utah, Wyoming, Montana, Nebraska, North and South Dakota, Idaho, Oregon, Washington, Arizona, and Nevada. IPAMS has over 200 members and represents over 3,000 individuals. Collectively, the companies comprising IPAMS spend hundreds of thousands of dollars each year in exploratory research to select prime areas of public land for lease nomination. When certain lands designated as available for oil and gas development in Resource Management Plans ("RMPs") are suddenly and arbitrarily removed from leasing in violation of federal law, the expectations that promoted exploratory research are unfairly denied. Exploring for oil and gas on public land is extremely important to the livelihood of IPAMS companies and is extremely risky and uncertain without the added uncertainty, as occurred in this case, as to whether federal laws

will be implemented as required by Congress. A 1999 industry survey conducted by IPAMS shows that approximately half of the companies surveyed had more than 50 percent of their operations on lands managed by the Bureau of Land Management ("BLM").

The Independent Petroleum Association of America ("IPAA") is a national industry association representing more than 8,000 independent crude oil and natural gas explorers and producers in the United States. The IPAA is dedicated to ensuring a strong, viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy. IPAA operates in close cooperation with the 44 unaffiliated independent national, state, and regional associations, which together represent thousands of royalty owners and the companies that provide services and supplies to the domestic petroleum industry. IPAA members are predominantly small businesses. The typical company employs 10 full-time and 3 part-time employees and has a net income of $250,000. Despite the small size of individual producers, their collective impact is quite large. Collectively, they produce 65 percent of the natural gas and nearly 40 percent of the crude oil consumed by Americans. IPAA members are highly dependent on access to federal land in accordance with federal law for their activities; 42 percent of its members currently hold federal or Indian leases.

Consequently, *amici* have a particularized interest in seeing that public land management decisions are governed by those laws enacted by Congress and by regularized, published processes and procedures that provide them meaningful opportunities to forward their interests,

and that such processes produce standards and guidelines that *amici* may rely upon in their dealings with land managers and in making investment decisions with regard to public lands.

OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE

Amici hereby adopt Petitioners' description of the Opinions Below, Statement of Jurisdiction, and Statement of the Case. *See*, Petitioners' Brief ("Pet. Bf.") at 1-9.

SUMMARY OF ARGUMENT

This Court should grant *certiorari* in this case for several reasons. The decision of the Tenth Circuit threatens to unsettle the legal certainty that the domestic petroleum industry and other users of public lands formerly found in RMPs and thus threatens to curtail domestic petroleum exploration and with it domestic energy security. *Marathon Oil Company v. Babbitt*, No. 97-1254 (10th Cir., filed January 6, 1999). Similarly, the decision threatens to dampen public confidence and participation in the federal land planning processes by demonstrating that the apparent statutory, regulatory, and procedural integrity of the process is a mere chimera to be overridden in backroom deals between political appointees and special interest groups.

Moreover, the decision of the Tenth Circuit ignores the development of this Court's jurisprudence regarding procedural injuries. By mischaracterizing Marathon's

injury as more substantive than procedural, the Tenth Circuit misapplied the redressability requirement. Should the Tenth Circuit's view prevail, the diminished burden of redressability this Court has found applicable to injuries of a primarily procedural nature would be effectively frustrated.

ARGUMENT

I. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE ISSUE IN THIS CASE IS OF NATIONAL IMPORTANCE.

A. The Decision Of The Tenth Circuit Threatens To Hinder The Continued Exploration For And Development Of Domestic Petroleum Supplies.

It has been the policy of this Court to grant *certiorari* in cases where the settled economic expectations of individuals are upset by government action. This Court has evinced this concern for regulatory certainty in the context of the Takings and *Ex Post Facto* clauses. *See, e.g., Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998); *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted"); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

IPAA and IPAMS members regularly rely upon the laws governing the use of public lands as enacted by Congress, as well as the standards and policies articulated in Resource Management Plans and other federal

planning documents, when formulating their exploration programs and financing activities. In the event that these laws and plans can no longer be relied upon because the decision of the Tenth Circuit is allowed to prevail, much of the domestic petroleum exploration activity in the Mountain West will be curtailed, if not ended altogether. Also ended will be many jobs in the industry, much of the development of new environmentally sensitive, petroleum recovery technology, and a large measure of this Nation's energy security and independence.

B. The Decision Of The Tenth Circuit Undermines Public Confidence That Public Lands Will Be Administered In Accordance With Federal Law.

The grassroots organizations and individual members of MSLF similarly rely upon federal public land law and public lands planning documents to inform their understanding of the recreational, economic, and esthetic opportunities available on public lands. The investments made by these affected interests may not be as great monetarily as those made by energy companies but are individually as important. Whether the planning documents inform a small logger of the availability of land suitable for timber harvest, an off-road vehicle user of her ability to access a particular piece of desert, or a hiker of the likelihood that he will be free from the interruptions of the former two, millions of Americans rely upon the inviolability and certainty of these documents.

Moreover, *amici* and others regularly engage in the processes that generate these documents. Beginning with

initial scoping of issues and continuing with the submission of written comments, *amici* and others forward their particular views as to the proper use of public lands and in so doing bring their invaluable insight and experience to the attention of public land managers. When the integrity of this process is subverted by the sort of unpublished policies and *ex parte* agreements at issue in this case, the confidence of all in the value of participating in the process is diminished and public decision-making will suffer as a result.

Moreover, since the adoption of the Federal Land Policy and Management Act (FLPMA) in 1976, under which authority the RMPs are required to be developed, *amici* and their members have expended millions of man-hours and tens, if not hundreds, of millions of dollars participating in the processes required by Congress through the FLPMA. All across the West, in those states in which the presence of public lands requires the time-consuming, land use planning process mandated by Congress, *amici* and their members have devoted a substantial and even incredible portion of their work and free time participating in the FLPMA-mandated land use planning process. Individuals who have scores of other demands on their time, including jobs, family, churches, and friends, have devoted an inordinate amount of time to the activities required by the FLPMA-mandated process including attending meetings, reading scoping documents, studying lengthy environmental documents, attending more hearings, and participating in administrative appeals. If the decision of the Tenth Circuit is allowed to stand, all of those efforts, not just in this case, but in similar situations across the West, will have been

for naught. Not only will that result frustrate the will of Congress, but it will end any public confidence whatsoever that the process mandated by Congress or their participation in it has any meaning, let alone importance.

II. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE TENTH CIRCUIT'S DENIAL OF STANDING VIOLATED THIS COURT'S WELL-ESTABLISHED PROCEDURAL INJURY JURISPRUDENCE.

This Court has held consistently that in order to support standing for a primarily procedural injury, Article III of the Constitution requires that a litigant must show a procedural shortcoming that injures a discrete, concrete interest. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-72 (1992). The Tenth Circuit failed to apply this Court's procedural injury jurisprudence, which failure has resulted in unsettling uncertainty among *amici* organizations and their members.

A. The Tenth Circuit's Unreasonable Characterization Of The Injury Suffered By Marathon Unfairly Led To An Incorrect Redressability Determination.

This Court's standing jurisprudence requires that a litigant allege an "injury in fact" that is redressable by a favorable decision. Where primarily procedural injuries are alleged, the Tenth Circuit has repeatedly and unfairly viewed the injury suffered for purposes of assessing redressability as a substantive rather than a procedural violation. The Tenth Circuit improperly characterized the

"injury in fact" suffered by Marathon as a lost mineral lease rather than the procedural injury associated with the loss of an opportunity to bid competitively for that lease. Similarly, in *Mount Evans Co. v. Madigan*, 14 F.3d 1444 (10th Cir. 1994), the Tenth Circuit ruled that a potential concessionaire doing business on public lands lacked standing to challenge the Forest Service's failure to rebuild a damaged concessions facility on the ground that the concessionaire's injuries were not redressable. The Tenth Circuit ruled that, even if the concessionaire were successful in having the facility rebuilt, there was no guarantee the concessionaire would successfully obtain the operation contract. *Id.* at 1451.

B. The Denial Of An Otherwise Available Competitive Opportunity Is Sufficient "Injury in Fact" For Purposes Of A Procedural Injury.

This Court has recognized previously that probable economic injury resulting from governmental actions that alter competitive conditions is sufficient to satisfy the Article III "injury-in-fact" requirement. *See, e.g., Bryant v. Yellen*, 447 U.S. 352, 367-68 (1980) (holding farmers' speculative opportunity to purchase property at below market prices given favorable decision was sufficient to establish injury in fact for Article III purposes.); and *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72-78 (1978) (holding that speculative prospect that atomic energy plant would become economically infeasible without subsidy was sufficient for challenge of the statute conferring subsidy by community group). Marathon's allegations that it could have not only bid on the subject leases but also participated in oil and gas field

development through a variety of commonplace industry contracting practices demonstrate a sufficiently concrete and particular "injury in fact" to support standing for a procedural deprivation.

C. The Redressability Requirement For Procedural Injuries Requires An Attenuated Degree Of Certainty That Marathon Has Met.

In assessing the likelihood that an injury will be redressed by a favorable decision, this Court has posited that there must be a prospect of obtaining relief from the injury that is not "too speculative." *Allen v. Wright*, 468 U.S. 737, 752 (1984). Because a procedural injury only admits of a procedural remedy that may not necessarily ensure the concrete outcome that a litigant might ultimately seek, this Court has required a diminished likelihood of redress in these cases. Specifically, this Court recognized:

> There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right *without meeting all the normal standards for redressability* and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 572, n.7 (1992) (emphasis added).

In *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), this Court squarely addressed the issue of redressability where the concrete interest affected by a primarily procedural injury is the chance to compete for an economic opportunity.

The plaintiff in *City of Jacksonville* alleged that a discriminatory policy precluded it from bidding competitively on city contracts. Plaintiff's standing was challenged on the basis that Plaintiff could not show that, if given the opportunity to bid, the necessary result would be a successful bid by one of its members. This Court rejected that challenge on the ground that to establish standing "a party challenging a set aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id.* at 666. With the injury framed as a denial of an opportunity rather than the denial of a result, this Court easily concluded that "a judicial decree directing the city to discontinue its program would 'redress' the injury." *Id.* at 666 n.5

Although *City of Jacksonville* arose in the equal protection context, its reasoning should be applied to this case in which Marathon alleges, among other things, that an illegally adopted and implemented policy frustrated the competitive opportunities that would otherwise have been available to it. Clearly, Marathon is able to "demonstrate that it is able and ready to bid [for oil and gas

leases on the public lands in question] and that [an illegal action] prevents it from doing so . . . " Furthermore, "a judicial decree directing [the Secretary] to discontinue [its illegal action] would 'redress' the injury."

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant the Petition for *Writ of Certiorari* of Marathon Oil Company.

Respectfully Submitted By:

WILLIAM PERRY PENDLEY*
ADAM T. REEVES
**Counsel of Record*
MOUNTAIN STATES LEGAL FOUNDATION
707 Seventeenth St., Suite 3030
Denver, Colorado 80202
(303) 292-2021

Attorneys for Amici Curiae

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No. 98-1952

IN THE

Supreme Court of the United States

MARATHON OIL COMPANY,

Petitioner,

v.

BRUCE BABBITT, Secretary of the United States Department of the Interior, UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, *et al.*,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

PATRICK G. PITET
Region Counsel
MARATHON OIL COMPANY
1501 Stampede Avenue
Cody, WY 82414-4721
(307) 527-3275

CRAIG R. CARVER
Counsel of Record
DON H. SHERWOOD
ALFERS & CARVER, LLC
730 17th Street
Suite 340
Denver, CO 80202
(303) 592-7674

Attorneys for Petitioner

154739

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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INTRODUCTION

The government's opposition brief acknowledges that the sole question presented by this petition concerns Marathon's standing.

The government presents three responses to this single question. First, it evades the issue altogether by asserting that the case is not ripe for review by this Court. Second, it contends (at p. 7) that even if the decision is ripe for review, this Court "need not devote its time to addressing what is, even accepting petitioner's arguments, merely a single erroneous unpublished decision." Third, it argues (at p. 9) that even though the Secretary unlawfully based his action on an unpublished policy, following "a judicial ruling setting aside its prior decision, BLM would be free to decide not to lease the lands based on another, lawful ground." This reasoning is used as the basis for contending that Marathon's claims are "not redressable" and therefore nonreviewable by any court.

The government's brief approves of, and explains how the circuit court's decision in this case utilizes this Court's "redressability" prong of the standing test. Under the rationale of the government and the Tenth Circuit, no longer is it important to determine whether an agency acted legally. Instead, the focus shifts to the hypothetical inquiry of whether there might have been a legal way for the agency to have reached the same result. If the answer to this question is in the affirmative, then no one possesses standing to challenge even an admittedly illegal action.

The government's brief (at p. 4) describes the circuit court's decision in this case as relying on "prior circuit precedent, which held that plaintiffs lacked standing to challenge the Secretary of the Interior's authority over the disposition of federal lands because their injuries were not redressable by a favorable judicial decision." Contrary to the government's contention that this petition presents only a single erroneous decision, this statement

concedes that at issue is the latest of a line of Tenth Circuit decisions that serve to insulate the Secretary's discretionary decisions from judicial review. As pointed out by the government's brief, the result is that in the Tenth Circuit most of the Secretary's land use decisions are now immune from judicial review.

This is a radical development, one that has come about because of the Tenth Circuit's misapplication of this Court's redressability test. The government's opposition brief not only acknowledges this trend, it seeks to extend it by asserting that this Court's redressability test "resembles" section 701(a)(2) of the APA in that it makes all discretionary agency decisions "not subject to judicial review." By acknowledging and advocating so fundamental a change in the relationship of the three branches of government, the Opposition Brief emphasizes exactly why this case does indeed warrant this Court's review.

ADMISSIONS AND OMISSIONS IN THE GOVERNMENT'S "STATEMENT"

The "Statement" portion of the government's Opposition Brief contains a number of admissions against interest, but it omits significant facts necessary to put those admissions into proper context. At its core, the government's brief admits that the BLM's decision in this case was based solely upon a request submitted by the Colorado Environmental Coalition (CEC). It further admits that the decision is designed to evaluate whether to include additional acres within wilderness study areas (WSAs) *after* expiration of the 15-year wilderness selection deadline dictated in Section 603 of FLPMA (43 U.S.C. § 1782).[1]

1. The Department's own review board, the IBLA, has concluded that: "the time for taking an appeal from BLM's decisions that [certain] areas were not suitable for designation as WSA's has long since passed. Accordingly, we conclude that the doctrine of administrative finality precludes Appellants [the CEC] from now challenging those decisions." *Colorado Environmental Coalition*, 149 IBLA 154 (June 10, 1999).

The government's Statement further admits that Marathon was ambushed by the Secretary's unpublished policy when it claims (at p. 3) that BLM's 1996 decision against Marathon was made "[i]n order to remain consistent with its May 1997 policy of protecting the wilderness option. . . ."

In describing events that post-date the district court's dismissal of Marathon's case, the government concedes (at p. 6) that the IBLA has concluded that the BLM's decision should be set aside and remanded because it was arbitrary, capricious, or otherwise contrary to law. However, it incorrectly asserts (at p. 5) that "on remand, BLM initiated the analysis ordered by the IBLA." In fact, over a year and a half after remand, Marathon submitted a Freedom of Information Act request to BLM, asking that it provide to Marathon "all documents which relate, discuss or refer to the IBLA's remand of the case of *Marathon Oil Co., 139 IBLA 347.*" In response, on February 19, 1999 the BLM wrote: "No actions have been taken referencing this IBLA's remand." That statement remains true today.

The government's Statement also mischaracterizes an order issued on May 26, 1999 in IBLA docket No. 99-133 as "dismissing the appeal as unripe until BLM has had time to complete the land-use planning process." That decision actually concluded by noting: "In effect, Marathon seeks a mandamus directing BLM to comply with our earlier decision. This Board lacks authority to take such action." The IBLA then pointed out in a footnote that under 28 U.S.C. § 1361 only the district court has jurisdiction of any action in the nature of mandamus.

Thus, the full truth of the matter is that the Secretary's own appeal board has held that BLM's actions in this case are arbitrary, capricious and contrary to law. That Board has then further acknowledged that it is powerless to require the BLM to conform to its decision, and has agreed with Marathon that

its sole remedy for addressing such lawless behavior is with the district court. The district court has, of course, found that Marathon lacks standing. Thus, unless that decision is reversed by this Court, the result will be that no one will be able to require the Secretary's land use decisions to conform to law.

As the government's opposition brief points out in its Argument section, this result is its overall goal. Although public lands decisions in general, and oil and gas leasing decisions in particular have routinely been reviewable and reviewed by federal courts in literally thousands of cases, the government now contends (at p. 10, n.5) that this Court's "redressability" test should be used to commit such decisions to agency discretion by law and "therefore not subject to judicial review."

This amounts to an attempt to free the Secretary from all controls imposed upon him by Congress or the courts.

THE GOVERNMENT RELIES UPON THE TENTH CIRCUIT'S USE OF THE "REDRESSABILITY" TEST TO ELIMINATE REVIEW OF DISCRETIONARY ACTIONS

The government's substantive responses to the single standing issue raised by the petition consist of three arguments, the cumulative effect of which is designed to utilize the Tenth Circuit's decision as the basis for avoiding review not only of this BLM decision, but of innumerable future decisions as well.

First, the government contends that since the Secretary's decision in this case "did not permanently bar leasing," on the properties sought by Marathon, it is not judicially reviewable. In the government's view, so long as the Secretary denominates an action as one that "reevaluates" land usage, such a decision is "not action taken pursuant to FLPMA, whose requirements do not even apply to limitations on leasing." As this argument

has found favor in the Tenth Circuit, the Secretary has — as in this case — increasingly utilized the simple expedient of labeling his decisions as non-permanent as the means of avoiding judicial review of virtually all his actions.

The government cites no law to support its position, because there is none. In general, the law is that "even an interim rule expected to be in place for only a brief time is subject to review, or agencies would be free to act unreasonably for that time." *Competitive Telecommunications Ass'n v. Fed. Communications Comm'n*, 87 F.3d 522, 531 (D.C. Cir. 1996) (citation omitted). In particular, FLPMA itself explicitly imposes a number of restraints on the Secretary's ability to proceed on an "interim" basis. For example, section 202(e)(2), 43 U.S.C. § 1712(e)(2), imposes procedural reporting requirements on the Secretary if he makes a management decision, as he has done here, that excludes mineral leasing for two or more years with respect to a tract of land of one hundred thousand acres or more.[2] The Secretary does not claim to have followed this law — to the contrary, the government's brief simply asserts he is not subject to it.

Second, the government contends that this Court's redressability test bars a plaintiff from possessing standing to challenge an illegal decision if the agency "would be free to decide not to lease the lands based on another, lawful ground." This argument was considered and expressly rejected in *Federal Election Comm'n v. Akins*, 524 U.S. 11, 23 (1998) (quoted in Marathon's Petition at p. 20). If either the government or the Tenth Circuit chose to acknowledge the holding and binding effect of *FEC*, they would have to abandon their contention that this Court's redressability test is supposed to have the effect of insulating discretionary agency actions from review.

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2. It is notable that all of the "authority" cited by the government to support its proposition that FLPMA does not govern the Secretary's leasing decisions was decided before enactment of FLPMA.

Unfortunately, both the Tenth Circuit's decision and the government's argument choose to disregard the holding of *FEC*.

Third, the government's opposition brief defends the circuit court's contention that *Lujan II* and *Bennett* are "inapposite," by asserting that Marathon is not the "object" of the BLM's decision to withhold the lands nominated by Marathon from leasing. Its only basis for advancing this curious contention is that the BLM's "decision affects all companies that might have bid with (or outbid) petitioner for the property withheld from sale." This argument seeks to convert this Court's requirement that a plaintiff's injury must be "particularized" for it to have standing,[3] into one that requires the plaintiff's injury to be unique. There is no such standing requirement, nor is there any reason whatsoever for creating such a requirement.

In summary, each of the substantive responses made by the government to support the Tenth Circuit's decision in this case contradicts applicable authority. This is probably not an unprecedented circumstance, and by itself does not negate the government's contention that "this Court need not devote its time" to this case. What does negate that contention is the purpose behind the government's arguments. The government's expressed goal is to make all of the Secretary's leasing and, presumably, other land use decisions "not subject to judicial review." The government's analysis confirms that in the Tenth Circuit (which covers a large proportion of the public lands of this country) it has already made substantial progress toward reaching that goal.

In the face of these developments, only this Court can preserve the Constitution's delegation to *Congress* of the "power to dispose of and make all needful Rules and Regulations respecting the . . . property belonging to the United States."[4]

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3. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

4. U.S. Const. Art. IV, § 3, cl. 2.

Petitioner respectfully suggests that the task of preserving the Constitution's balance of powers among the three branches of government does indeed warrant the expenditure of this Court's time.

RIPENESS IS NOT AN ISSUE ON THIS RECORD

After asserting before the district court that "DOI agrees that the case is ripe for judicial adjudication, and DOI will not interpose the defense that Marathon failed to exhaust its administrative remedies," the Secretary argued to the circuit court that this case was not ripe for review. Marathon responded by pointing out that the factual record necessary to make a proper ripeness decision did not exist — it would have to be developed at the district court level before that issue could be properly addressed on appeal. The court of appeals based no part of its decision on ripeness grounds. This Court should do likewise.

The Secretary argues that he may raise a jurisdictional issue such as ripeness at any time in the proceedings. This argument misses the point. By not having raised the issue in the district court, the Secretary prevented any record from being developed on the issue. Accordingly, this Court does not possess the record that is necessary to make a determination of whether this case is ripe.

Implicitly acknowledging this problem, the Secretary sought to disguise it by tendering to the court of appeals a document entitled "Supplemental Appendix for Federal Appellees." The documents included in this "supplemental appendix" did not form part of the appellate record. They consisted, instead, of a partial selection of documentation post-dating the taking of the appeal. The government's opposition brief before this Court follows the same procedurally improper approach.

A large number of documents that bear on the issue of the current status of the Secretary's policy as it applies to these lands are missing from the government's Statement and "Supplemental Appendix" submitted to the court of appeals. One example consists of the documentation necessary to explain why the 1997 results of BLM's roadless review process concluded that many of the lands sought by Marathon are indeed "roaded," and unsuitable for wilderness, yet those same lands remain unavailable for lease today. Another example consists of documents that might explain why BLM has taken no action in response to the IBLA decision relied upon by the government.

Both before and after issuance of the IBLA decision, the BLM decision challenged by Marathon in this case has remained in full force and effect. No departmental review of the propriety of the Secretary's policy that prompted the BLM decision is under consideration, and the BLM's current actions, by its own admission, do not involve any efforts to change the policy or its specific current effects on lands sought by Marathon.

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process, . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

Bennett v. Spear, 520 U.S. 154, 177-8 (1997) (citations omitted).

Rights and obligations of Marathon have been determined as a consequence of the Secretary's policy, and legal consequences (e.g. withdrawal of the lands sought by Marathon from lease sale, with consequent damage to Marathon) have

flowed. Under the BLM's own regulations, a policy established at the level of the Director or higher is final for purposes of judicial review.[5] Those same regulations specify that if a decision under appeal remains in full force and effect without being stayed for more than seventy-five days, then that decision becomes final for purposes of judicial review. 43 C.F.R. § 4.21(a) (1996). When the IBLA declared the decision to be improper, nothing happened to change the situation. Its practical effect remains the same as it has been since issuance — i.e. in full force and effect.

The appropriate response of an appellate court in these circumstances is to remand the ripeness question to the district court for proceedings to develop the needed facts. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 66-67 (1993).

CONCLUSION

The government's opposition brief posits that this Court's redressability test is meant to make illegal and procedurally flawed agency decisions non-reviewable by the courts if, following a judicial ruling setting aside such decisions, the agency "would be free to decide not to lease the lands based on another, lawful ground." The government's brief confirms that this proposition emerges from a line of Tenth Circuit cases, the latest of which is the decision at issue in this petition.

The government is utilizing the lower court decisions in this case to convert this Court's standing doctrine into a weapon that is radically altering the Constitution's delegation of powers between the executive and congressional branches of government in managing the public lands. Proof that this conclusion does not exaggerate the shift in powers that is

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5. 43 C.F.R. § 4.5 (1996). Marathon's Complaint alleges that the Secretary either imposed or approved the policy challenged in this action.

underway is provided by the government's opposition brief. In that brief the Secretary asserts flatly that his leasing decisions are not governed by the comprehensive policies set out in the Federal Land Policy and Management Act, and that no one has standing to challenge that assertion in court.

If in fact no one has standing to challenge the Secretary's assertions, then he will have succeeded in evading policy controls imposed on him in FLPMA. This Court should grant the petition to prevent that outcome.

Respectfully submitted,

CRAIG R. CARVER
Counsel of Record
DON H. SHERWOOD
ALFERS & CARVER, LLC
730 17th Street
Suite 340
Denver, CO 80202
(303) 592-7674

PATRICK G. PITET
Region Counsel
MARATHON OIL COMPANY
1501 Stampede Avenue
Cody, WY 82414-4721
(307) 527-3275

Attorneys for Petitioner